TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908

No. 238.

THE CHICAGO AND ALTON RAILWAY COMPANY, PETITIONER,

vs.

UNITED STATES OF AMERICA.

No. 239.

JOHN N. FAITHORN, PETITIONER,

vs.

UNITED STATES OF AMERICA.

No. 240.

FRED A. WANN, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED JANUARY 7, 1909.
CERTIORARI AND RETURNS FILED FEBRUARY 15, 1909.

(20,960, 20,961, and 20,962.)

( )

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No.

THE CHICAGO AND ALTON RAILWAY COMPANY, PETITIONER,

vs.

UNITED STATES OF AMERICA.

No.

JOHN N. FAITHORN, PETITIONER,

vs.

UNITED STATES OF AMERICA.

No.

FRED A. WANN, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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1 At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held at the United States Court Rooms in the City of Chicago in said Seventh Circuit on the third day of October, 1905, of the October Term in the year of our Lord one thousand nine hundred and five and of our Independence the one hundred and thirtieth.

And afterwards, to-wit: On the sixteenth day of July, 1906, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

MONDAY, *July* 16, 1906.

Before Hon. Peter S. Grosscup, Presiding Judge.

1303.

THE CHICAGO & ALTON RAILWAY COMPANY

vs.

UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Northern Division.

Let a writ of error issue from the United States Circuit Court of Appeals for the Seventh Circuit to the United States District Court of the Northern Division of the Northern District of Illinois as prayed for in said petition for writ of error of The Chicago & Alton Railway Company, a corporation, and let said writ of error
2 operate as a supersedeas staying the execution of the judgment and sentence pronounced in said District Court against said The Chicago & Alton Railway Company during the pendency of said writ of error and until the further order of said Circuit Court of Appeals, upon the filing with the clerk of said United States Circuit Court of Appeals of a good and sufficient bond in the sum of forty thousand dollars ($40,000.00), conditioned as required by law, with sureties to be approved by the Clerk of said Court.

And the Clerk of said District Court is hereby directed to make return of the three several writs of error sued out and allowed in said cause in behalf of said Fred A. Wann and of said John N. Faithorn and of said The Chicago & Alton Railway Company by transmitting to said Clerk of the United States Circuit Court of Appeals a single and true copy of the record and proceedings in the above entitled cause and of the bill of exceptions in said cause and of the three several assignments of error of said Fred A. Wann, John

N. Faithorn and The Chicago & Alton Railway Company, and of the proceedings had in said District Court in the above entitled cause No. 3627 necessary to the hearing in said Circuit Court of Appeals of said several writs of error.

And on good cause shown, it is ordered that the time for filing the record herein in pursuance of said writ of error be and the same is hereby extended to and including the 10th day of September, A. D. 1906.

3 And afterwards, on the same day, to-wit: On the sixteenth day of July, 1906, in the October term last aforesaid, there was filed in the office of the clerk of this court the bond of The Chicago & Alton Railway Company, in the words and figures following to-wit:

Know All Men by These Presents, That we, Chicago & Alton Railway Company (an Illinois Corporation) ....., as principal, and Illinois Surety Company (an Illinois corporation) ..... as surety, are held and firmly bound unto the United States of America in the full and just sum of forty thousand dollars ($40,000.00), to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 16th day of July, A. D. 1906.

Whereas, lately at the July term, A. D. 1906, of the District Court of the United States for the Northern District of Illinois, Northern Division, in a cause pending in said Court between the United States of America, plaintiff, and said Chicago & Alton Railway Company ....., impleaded with Fred A. Wann and John N. Faithorn ....., defendants, a judgment and sentence were rendered against said Chicago & Alton Railway Company ..... and the said Chicago & Alton Railway Company ..... has prayed and been allowed a writ of error from the United States Circuit Court of Appeals for the Seventh Circuit to the said United States District Court to reverse the judgment and sentence in the aforesaid suit;

Now, the condition of the said obligation is such that if the said Chicago & Alton Railway Company ..... shall appear in the said Circuit Court of Appeals on the 2nd day of October, A. D. 1906, and from day to day thereafter in said court until said cause shall be finally disposed of and shall abide by and obey the judgment and order made by the said Circuit Court of Appeals ..... in said cause and shall pay the said judgment against him if the same shall be affirmed, and if he shall appear for trial in the said District Court of the United States for the Northern District of Illinois, Northern Division, on such day as may be appointed for a retrial by said District Court and abide by and obey all orders of said Court, provided said judgment and sentence against him

4 shall be reversed by said Circuit Court of Appeals

..... then the above obligation to be void; otherwise to remain in full force and virtue.

CHICAGO & ALTON RAILWAY CO.,
(Signed) By JOS. W. BLABON.

[The Chicago and Alton Railway Company, Incorporated 1900, State of Illinois.]

ILLINOIS SURETY COMPANY,
By WILLIAM COFFEEN,
Acting President.

[Illinois Surety Company, Incorporated 1905, Chicago, Illinois.]

Attest:
C. H. DAVIS,
Asst. Secretary.

Attest:
W. HERBERT STEWART, *Secretary.*

Approved: To act as supersedeas.
O. K. as to form and sureties:
(Signed) C. B. MORRISON,
U. S. Attorney.

Approved:
(Signed) EDWARD M. HOLLOWAY, *Clerk.*

Endorsed: Filed Jul- 16, 1906. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the sixteenth day of July, 1906, in the October term last aforesaid, there issued out and under the seal of this court a writ of error directed to the Judges of the District Court of the United States for the Northern District of Illinois, which writ of error is in the words and figures following, to-wit:

5 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States, for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between United States of America and Fred A. Wann, John N. Fairthorn and The Chicago and Alton Railway Company a manifest error hath happened, to the great damage of the said The Chicago & Alton Railway Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same,

to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Seventh Circuit at Chicago, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller Chief Justice of the United States, the 16th day of July, in the year of our Lord one thousand nine hundred and six.

[SEAL.] EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Allowed by
P. S. GROSSCUP, *Judge.*

6 And afterwards, on the same day, to-wit: On the sixteenth day of July, 1906, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

MONDAY, *July* 16, 1906.

Before Hon. Peter S. Grosscup, Presiding Judge.

JOHN N. FAITHORN
vs.
UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Northern Division.

Let a writ of error issue from the United States Circuit Court of Appeals for the Seventh Circuit to the United States District Court of the Northern Division of the Northern District of Illinois as prayed for in said petition for writ of error of John N. Faithorn, and let said writ of error operate as a supersedeas staying the execution of the judgment and sentence pronounced in said District Court against the said John N. Faithorn during the pendency of said writ of error and until the further order of said Circuit Court of Appeals, upon the filing with the Clerk of said United States Circuit Court of Appeals of a good and sufficient bond in the sum of ten thousand dollars ($10,000.00), conditioned as required by law, with sureties to be approved by the Clerk of said Court.

And the Clerk of said District Court is hereby directed to make return of the three writs of error sued out and allowed in said cause in behalf of said Fred A. Wann and of said John N. Faithorn and of said The Chicago & Alton Railway Company by transmitting to said Clerk of the United States Circuit Court of Appeals a single and

true copy of the record and the proceedings in the above entitled cause and of the bill of exceptions in said cause and of the three several assignments of error of said Fred A. Wann, John N. Faithorn and The Chicago & Alton Railway Company and of the three several petitions for writ of error of the said Fred A. Wann, John N. Faithorn and The Chicago & Alton Railway Company and of the proceedings had in said District Court in the above entitled cause No. 3627 necessary to the hearing in said Circuit Court of Appeals of said three several writs of error.

And on good cause shown, it is ordered that the time for filing the record herein in pursuance of said writ of error be and the same is hereby extended to and including the 10th day of September, A. D. 1906.

7 And afterwards, on the same day, to-wit: On the sixteenth day of July, 1906, in the October term last aforesaid, there was filed in the office of the clerk of this court the bond of John N. Faithorn, which bond is in the words and figures following, to-wit:

Know All Men by These Presents, That we, John N. Faithorn of the City of Chicago, State of Illinois, as principal, and Illinois Surety Company (an Illinois corporation) as surety, are held and firmly bound unto the United States of America in the full and just sum of ten thousand dollars ($10,000.00), to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 16th day of July, A. D. 1906.

Whereas, lately at the July term, A. D. 1906, of the District Court of the United States for the Northern District of Illinois, Northern Division, in a cause pending in said court between the United States of America, plaintiff, and said John N. Faithorn ..... impleaded with Fred A. Wann and Chicago & Alton Railway Company ... . defendants, a judgment and sentence were rendered against said John N. Faithorn ..... and the said John N. Faithorn .... has prayed and been allowed a writ of error from the United States Circuit Court of Appeals for the Seventh Circuit to the said United States District Court to reverse the judgment and sentence in the aforesaid suit:

Now, the condition of the said obligation is such that if the said John N. Faithorn ..... shall appear in person in the said Circuit Court of Appeals ..... on the 2nd day of October, A. D. 1906, and from day to day thereafter in said court, until said cause shall be finally disposed of and shall abide by and obey the judgment and order made by the said Circuit Court of Appeals ..... in said cause and shall pay the said judgment against him if the same shall be affirmed, and if he shall appear for trial in the said District Court of the United States for the Northern District of Illinois, Northern Division, on such day as may be appointed for a retrial by said District Court and

8 abide by and obey all orders of said Court, provided said judgment and sentence against him shall be reversed by said Circuit Court of Appeals then the above obligation to be void; otherwise to remain in full force and virtue.

JOHN N. FAITHORN. [SEAL.]
ILLINOIS SURETY COMPANY,
By WILLIAM COFFEEN,
Acting President.

[Illinois Surety Company, Incorporated 1905, Chicago, Illinois.]

Attest:
(Signed) W. HERBERT STEWART, *Secretary.*

Approved to act as supersedeas.
O. K. as to form and sureties:
(Signed) C. B. MORRISON,
U. S. Attorney.

Approved:
(Signed) EDWARD M. HOLLOWAY, *Clerk.*

Endorsed: Filed Jul- 16, 1906. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the sixteenth day of July, 1906, in the October term last aforesaid, there issued out of and under the seal of this court a writ of error directed to the Judges of the District Court of the United States for the Northern District of Illinois, which writ of error was in the words and figures following, to-wit:

9 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the District Court of the United States, for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between United States of America and Fred A. Wann, John N. Faithern and The Chicago and Alton Railway Company a manifest error hath happened, to the great damage of the said John N. Faithorn as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the said United States Circuit

Court of Appeals for the Seventh Circuit at Chicago, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of July, in the year of our Lord one thousand nine hundred and six.

[SEAL.] EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Allowed by

P. S. GROSSCUP, *Judge.*

And afterwards, on the same day, to-wit: On the sixteenth day of July, 1906, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

10

MONDAY, *July* 16, 1906.

Before Hon. Peter S. Grosscup, Presiding Judge.

FRED A. WANN
vs.
UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Northern Division.

Let a writ of error issue from the United States Circuit Court of Appeals for the Seventh Circuit to the United States District Court of the Northern Division of the Northern District of Illinois as prayed for in said petition for writ of error of Fred A. Wann, and let said writ of error operate as a supersedeas staying the execution of the judgment and sentence pronounced in said District Court against said Fred A. Wann during the pendency of said writ of error and until the further order of said Circuit Court of Appeals, upon the filing with the Clerk of said United States Circuit Court of Appeals of a good and sufficient bond in the sum of ten thousand dollars ($10,000.00), conditioned as required by law, with sureties to be approved by the Clerk of said Court.

And the Clerk of said District Court is hereby directed to make return of the three several writs of error sued out and allowed in said cause in behalf of said Fred A. Wann and of said John N. Faithorn and of said The Chicago & Alton Railway Company by transmitting to said Clerk of the United States Circuit Court of Appeals a single and true copy of the record and the proceedings in the above en-

titled cause and of the bill of exceptions in said cause and of the three several assignments of error of said Fred A. Wann, John N. Faithorn and The Chicago & Alton Railway Company and of the three several petitions for writ of error of the said Fred A. Wann, John N. Faithorn and The Chicago & Alton Railway Company and of the proceedings had in said District Court in the above entitled cause No. 3627 necessary to the hearing in said Circuit Court of Appeals of said three several writs of error.

And on good cause shown, it is ordered that the time for filing the record herein in pursuance of said writ of error be and the same is hereby extended to and including the 10th day of September, A. D. 1906.

——— ———.

11 And afterwards, on the same day, to-wit: On the sixteenth day of July, 1906, in the October term last aforesaid, there was filed in the office of the clerk of this court the bond of Fred A. Wann, which bond is in the words and figures following, to-wit:

Know All Men by These Presents, That Fred A. Wann of the City of Chicago, State of Illinois, as principal, and Illinois Surety Company (an Illinois Corporation) as surety, are held and firmly bound unto the United States of America in the full and just sum of ten thousand dollars ($10,000.00), to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 16th day of July, A. D. 1906.

Whereas, lately at the July term, A. D. 1906, of the District Court of the United States for the Northern District of Illinois, Northern Division, in a cause pending in said Court between the United States of America, plaintiff and said Fred A. Wann, impleaded with John N. Faithorn and Chicago & Alton Railway Company, defendants, a judgment and sentence were rendered against said Fred A. Wann, and the said Fred A. Wann has prayed and been allowed a writ of error from the United States Circuit Court of Appeals for the Seventh Circuit to the said United States District Court to reverse the judgment and sentence in the aforesaid suit:

Now, the condition of the said obligation is such that if the said Fred A. Wann shall appear in person in the said Circuit Court of Appeals on the 2nd day of October, A. D. 1906, and from day to day thereafter in said Court until said cause shall be finally disposed of and shall abide by and obey the judgment and order made by the said Circuit Court of Appeals in said cause and shall pay the said judgment against him if the same shall be affirmed, and if he shall appear for trial in the said District Court of the United States for the Northern District of Illinois, Northern Division, on such day as may be appointed for a retrial by said District Court and abide by and obey all orders of said Court, provided said judgment and sentence

against him shall be reversed by said Circuit Court of Appeals
12 then the above obligation to be void; otherwise to remain in full force and virtue.

(Signed) FRED A. WANN, [SEAL.]
ILLINOIS SURETY COMPANY,
(Signed) By WILLIAM COFFEEN,
Acting President.

[Illinois Surety Company Incorporated 1905, Chicago, Ill.]

Attest:
(Signed) W. HERBERT STEWART, *Secretary.*

Approved: to act as supersedeas.
O. K. as to form and sureties:
(Signed) C. B. MORRISON,
U. S. Attorney.

Approved:
(Signed) EDWARD M. HOLLOWAY, *Clerk.*

Endorsed: Filed Jul- 16, 1906. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the sixteenth day of July, 1906, in the October term last aforesaid, there issued out of and under the seal of this court a writ of error directed to the Judges of the District Court of the United States for the Northern District of Illinois, which writ is in the words and figures following, to-wit:

13 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States, for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between United States of America and Fred A. Wann John N. Faithorn and The Chicago and Alton Railway Company a manifest error hath happened, to the great damage of the said Fred A. Wann. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Seventh Circuit at Chicago, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United — Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of July, in the year of our Lord one thousand nine hundred and six.

[SEAL.] EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Allowed by
P. S. GROSSCUP, *Judge.*

And afterwards, to-wit: On the nineteenth day of July, 1906, in the October term last aforesaid, came the Chicago & Alton Railway Company, John Faithorn and Fred A. Wann, by their counsel Mr. F. S. Winston, Mr. John Barton Payne and Mr. Ralph M. Shaw, and filed in the office of the clerk of this court their appearances, which appearances are in the words and figures following, to-wit:

14 United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1905.

No. 1303.

THE CHICAGO & ALTON RAILWAY COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA.

The Clerk will enter our appearance as Counsel for the Plaintiff-in-Error.

F. S. WINSTON.
JOHN BARTON PAYNE.
RALPH M. SHAW.

Endorsed: Filed Jul- 19, 1906. Edward M. Holloway, Clerk.

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1905.

No. 1304.

JOHN FAITHORN, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA.

The Clerk will enter our appearance as Counsel for the Plaintiff-in-Error.

F. S. WINSTON.
JOHN BARTON PAYNE.
RALPH M. SHAW.

Endorsed: Filed Jul- 19, 1906. Edward M. Holloway, Clerk.

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1905.

No. 1305.

FRED A. WANN, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA.

The Clerk will enter our appearance as Counsel for the Plaintiff-in-Error.

F. S. WINSTON.
JOHN BARTON PAYNE.
RALPH M. SHAW.

Endorsed: Filed Jul- 19, 1906. Edward M. Holloway, Clerk.

15 And afterwards, to-wit: On the twenty-fourth day of July, 1906, in the October term last aforesaid, came the United States of America, by its counsel Mr. C. B. Morrison, and filed in the office of the clerk of this court his appearances, which appearances are in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1905.

No. 1303.

THE CHICAGO & ALTON RAILWAY COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA.

The Clerk will enter my appearance as Counsel for the Defendant-in-Error.

C. B. MORRISON.

Endorsed: Filed Jul- 24, 1906. Edward M. Holloway, Clerk.

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1905.

No. 1304.

JOHN N. FAITHORN, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA.

The Clerk will enter my appearance as Counsel for the Defendant-in-Error. C. B. MORRISON.

Endorsed: Filed Jul- 29, 1906. Edward M. Holloway, Clerk.

16 United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1905.

No. 1305.

FRED A. WANN, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA.

The Clerk will enter my appearance as Counsel for the Defendant-in-Error.

C. B. MORRISON.

Endorsed: Filed Jul- 24, 1906. Edward M. Holloway, Clerk.
Endorsed: Filed Jul- 24, 1906. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the eighteenth day of August, 1906, in the October term last aforesaid, there was filed in the office of the clerk of this court three citations, which citations are in the words and figures following, to-wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the United States of America (C. B. Morrison, U. S. District Att'y Northern District of Illinois, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the U. S. District Court of Northern District of Illinois—Northern Division wherein Chicago & Alton Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment & sentence rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable —— ——, Judge of the Circuit Court of the United States this 10 day of August, in the year of our Lord one thousand nine hundred and six.

P. S. GROSSCUP,
Circuit Judge.

Received copy of above citation August 16, 1906.
E. G. GODMAN,
Ass't U. S. Att'y.

(Endorsed:) No. 1303 United States Circuit Court of Appeals. Seventh Circuit. C. & A. Ry. Co. *vs.* U. S. of America. Citation. Filed Aug. 18, 1906. Edward M. Holloway, Clerk.

17 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the United States of America (C. B. Morrison, U. S. District Attorney for Northern District of Illinois, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the U. S. District Court of Northern District of Illinois Northern Division wherein John N. Faithorn is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment & sentence rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable —— ——, Judge of the Circuit Court of the United States this 10 day of August, in the year of our Lord one thousand nine hundred and six.

P. S. GROSSCUP,
Circuit Judge.

Received copy of above citation August 16, 1906.
E. G. GODMAN,
Ass't U. S. Att'y.

(Endorsed:) No. 1304. United States Circuit Court of Appeals, Seventh Circuit. John N. Faithorn *vs.* U. S. of America. Citation. Filed Aug. 18, 1906. Edward M. Holloway, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the United States of America (C. B. Morrison, U. S. District Attorney—Northern District of Illinois), Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the U. S. District Court of Northern District of Illinois wherein Fred A. Wann is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment & sentence rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable —— ——, Judge of the Circuit Court of the United States this 10 day of August, in the year of our Lord one thousand nine hundred and six.

P. S. GROSSCUP,
Circuit Judge.

Received copy of above citation August 16, 1906.
E. G. GODMAN,
Ass't U. S. Att'y.

(Endorsed:) No. 1305. United States Circuit Court of Appeals, Seventh Circuit. Fred A. Wann *vs.* U. S. of America. Citation. Filed Aug. 18, 1906. Edward M. Holloway, Clerk.

18 And afterwards, to-wit: On the seventh day of September, 1906, in the October term last aforesaid, there was filed in the office of the clerk of this court the return of the clerk of the District Court of the United States for the Northern District of Illinois, to the three writs of errors, which return is in the words and figures following, to-wit:

Pleas had at a regular term of the District Court of the United States for the Northern Division of the Northern District of Illinois begun and held at the United States Court Rooms in the City of Chicago in said Division of said District on the first Monday of July, it being the second day thereof, in the year of our Lord One thousand nine hundred and six and of the Independence of the United States of America the one hundred and thirtieth year.

Present the Honorable S. H. Bethea and the Honorable Kenesaw M. Landis, Judges of the District Court of the United States for the Northern District of Illinois, John C. Ames, United States Marshal for said District, and T. C. MacMillan, Clerk of said District Court.

19 In the District Court of the United States for the Northern District of Illinois, Northern Division.

3627.

UNITED STATES OF AMERICA
vs.
FRED A. WANN, JOHN S. FAITHORN, and THE CHICAGO & ALTON RAILWAY COMPANY.

Be it remembered that heretofore, towit, on the 13th day of December, A. D. 1905, the following order was had and entered of record in said cause before the Honorable Kenesow M. Landis, Judge of the District Court of the United States for the Northern District of Illinois, towit:

3627.

THE UNITED STATES
vs.
THE CHICAGO AND ALTON RAILWAY COMPANY, JOHN N. FAITHORN, and FRED A. WANN.

Comes the Grand Jury this day and returns in open Court an indictment against The Chicago and Alton Railway Company, John

N. Faithorn and Fred A. Wann, the defendants herein, whereupon on motion of the United States Attorney, it is Ordered by the Court that said indictment be filed and the cause placed upon the dockets of this court.

And afterwards, towit, on the 13th day of December, A. D. 1905, there was filed in open court an Indictment in the above entitled cause, the same being in the words and figures following, towit:

20 In the District Court of the United States of America for the Northern District of Illinois, Northern Division, of the July Term, in the Year Nineteen Hundred and Five.

NORTHERN DISTRICT OF ILLINOIS, *Northern Division, ss:*

The grand jurors for the United States of America, inquiring for the Northern Division of the Northern district of Illinois, upon their oath present, that before and at the several times of the committing of the several offenses in the first four counts of this indictment hereafter mentioned, by the corporation and individual defendants hereinafter named, The Chicago and Alton Railway Company was a corporation organized and existing under the laws of the State of Illinois, and was engaged in the transportation of property by railroad, under contracts, agreements and arrangements with divers other connecting railroad companies, to wit, the Kansas City Belt Railway Company, the Chicago Junction Railroad Company, the Indiana, Illinois and Iowa Railroad Company, the Michigan Central Railroad Company, The New York Central and Hudson River Railroad Company, the Lehigh Valley Railroad Company, the Delaware, Lackawanna and Western Railroad Company, the New York, Chicago and St. Louis Railroad Company, and the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, for a continuous carriage and shipment by railroad, from one state of the said United States to other of those states, to wit, from Kansas City, in the State of Kansas, to the divers other cities and points in this count of this indictment hereafter named, and so was a corporation common carrier subject to the provisions of the Act of Congress, approved February 4, 1887, entitled "An Act to regulate commerce," and of the acts amendatory thereof; that before and at the said several times John N. Faithorn was an officer and agent of, and a person acting for and employed by, the said corporation, that is to say, vice president of the said cor-

21 poration; that before and at the said several times Fred A. Wann was also an officer and agent of, and a person acting for and employed by, the said corporation, namely, general freight agent of the said corporation; and that heretofore, to wit, during the month of December, in the year nineteen hundred and three, the Schwarzschild and Sulzberger Company, a corporation theretofore organized and then existing under and by virtue of the laws of the State of New York, did deliver certain property, to wit, forty-four car loads of dressed beef and packing-house products, to the said common carrier, at Kansas City aforesaid, for transportation by the said common carrier and its said connecting railroads, to divers other cities and

points in other states of the said United States, and the said common carrier did, immediately upon and in pursuance of such delivery of the said property to it, transport the same to those points, as specifically shown in the following statement, that is to say:

Car No.	Destination.	Date of Shipment.
27888	Chicago, Illinois	December 1, 1903.
27884	" "	" 3, "
1784	Peoria, Illinois	" 5, "
153	Peoria, Illinois	" 7, "
27739	Chicago, Illinois	" 8, "
8568	" "	" 11, "
348	Peoria, Illinois	" 12, "
1810	" "	" 14, "
8720	Chicago, Illinois	" 16, "
2162	" "	" 19, "
4586	" "	" 19, "
27826	" "	" 19, "
217	Peoria, Illinois	" 20, "
1932	" "	" 21, "
27706	Chicago, Illinois	" 22, "
10632	" "	" 23, "
5177	" "	" 23, "
1959	Peoria, Illinois	" 28, "
27856	Chicago, Illinois	" 28, "
27768	" "	" 30, "
156	Cleveland, Ohio	" 3, "
350	" "	" 7, "
1586	" "	" 10, "
41	" "	" 12, "
321	" "	" 14, "
1737	" "	" 16, "
1921	" "	" 23, "
22		
212	Pittston, Pennsylvania	December 1, 1903.
18	" "	" 4, "
42	" "	" 5, "
394	" "	" 8, "
1589	" "	" 12, "
293	" "	" 29, "
1592	Newark, New Jersey	" 2, "
1410	" "	" 7, "
1715	" "	" 14, "
335	" "	" 28, "
1514	Schenectady, New York	" 1, "
339	" "	" 8, "
276	" "	" 22, "
1801	" "	" 29, "
1654	Pittsburgh, Pennsylvania	" 10, "
1429	" "	" 24, "
38	" "	" 28, "

upon which said property, and for the transportation thereof as aforesaid, the said Schwarzschild and Sulzberger Company did thereupon pay to the said common carrier, and the said common carrier did receive from the said Schwarzschild and Sulzberger Company, in items and totals to the said grand jurors unknown, the freight rates and charges set forth in the joint tariffs and schedules showing the legal rates and charges established by the said common carrier and the said connecting railroads and in force at the time upon their routes, copies of which said tariffs and schedules, as well as of the said contracts, agreements and arrangements with the said connecting railroads, too voluminous to be here set forth, had before then been by the said common carrier filed, and were then on file, with the Interstate Commerce Commission of the said United States, as required by law.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said The Chicago and Alton Railway Company, corporation common carrier as aforesaid, and the said John N. Faithorn, vice president, and Fred A. Wann, general freight agent, of the said common carrier as aforesaid, afterwards, to wit, on the twentieth day of May, in the year nineteen hundred and four, at the city of Chicago, in the said Northern Division of the said Northern District of Illinois, unlawfully did offer to pay and to give to the said Schwarzschild and Sulzberger Company, corporation as aforesaid, certain rebates of the said freight rates and
23 charges and certain concessions in respect of the said transportation of that property, in the interstate commerce aforesaid, whereby the said property would be by the said corporation common carrier and its said connecting railroads transported in the said interstate commerce at less compensation and rates than those named therefor in the said tariffs and schedules, that is to say, a rebate, refund and concession of one dollar of the said freight rates and charges for and upon each of the said car loads; and, further, that they the said John N. Faithorn and Fred A. Wann were then and there acting in that behalf within the scope of their said respective employments: Against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

Second Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the said twentieth day of May, in the year nineteen hundred and four, at the said city of Chicago, in the said Northern Division of the said Northern District of Illinois, the said The Chicago and Alton Railway Company, then a corporation common carrier engaged in the transportation of passengers and property by railroad, under contracts, agreements and arrangements with the divers other connecting railroads in the first count of this indictment named, as in that count set forth, and the said John N. Faithorn and Fred A. Wann, officers and agents of and persons acting for and employed by the said common carrier as in the same

count specified, unlawfully did grant to the said Schwarzschild and Sulzberger Company, corporation as in the said first count aforesaid, certain rebates of the freight rates and charges theretofore by it, in items and totals to the said grand jurors unknown, collected upon, and certain concessions in respect of the transportation in interstate commerce of, certain other property, to wit, forty-four car loads of dressed meats and packing house products, which had before then, to wit, during the said month of December, in the year nineteen hundred and three, been delivered by the said Schwarzschild and Sulzberger Company, at Kansas City aforesaid, in the said State of Kansas, to the said common carrier, for transportation, and which had been transported by the said common carrier and the said
24 connecting railroads, in pursuance of such delivery, to divers other cities and points in divers other states of the said United States, as shown in the statement in that behalf in the said first count exhibited, that is to say, a rebate of one dollar upon each of the said forty-four car loads of dressed meats and packing house products, so as last aforesaid delivered and transported; the said freight rates then and there being the freight rates and charges set forth in the joint tariffs and schedules showing the legal rates and charges established by the said corporation common carrier and the said connecting railroads and in force at the time upon their routes; copies of which last-mentioned tariffs and schedules, as well as of the last-mentioned contracts, agreements and arrangements then in force between the said corporation common carrier and the said connecting railroads, for continuous carriage and shipment of such property from Kansas City aforesaid to the points last aforesaid, (too voluminous to be here set forth), had been by the said corporation common carrier filed, and then were on file, with the said Interstate Commerce Commission, as required by law; by which granting of the said rebates and concessions in this count of this indictment mentioned the property last aforesaid was by the said corporation common carrier and its said connecting railroads transported in the said interstate commerce at less rates than those named therefor in the last-mentioned tariffs and schedules; and, further, that they the said John N. Faithorn and Fred A. Wann, at the time and place of so granting the last-mentioned rebates and concessions, were acting in that behalf within the scope of their said respective employments: Against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

Third Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the said twentieth day of May, in the year nineteen hundred and four, at the said city of Chicago, in the said Northern Division of the said Northern District of Illinois the said The Chicago and Alton Railway Company, then a corporation common carrier engaged in the transportation of passengers and property by railroad, under contracts, agreements and arrangements with the

divers other connecting railroads in the first count of this in-
25 dictment named, as in that count set forth, and the said John N. Faithorn and Fred A. Wann, officers and agents of and persons acting for and employed by the said corporation common carrier as in the same count specified, unlawfully did give to the said Schwarzschild and Sulzberger Company, corporation as in the said first count aforesaid, certain rebates of the freight rates and charges theretofore by it, in items and totals to the said grand jurors unknown, collected upon, and certain concessions in respect of the transportation in interstate commerce of, certain other property, to wit, forty-four car loads of dressed meats and packing house products, which had before then, to wit, during the said month of December, in the year nineteen hundred and three, been delivered by the said Schwarzschild and Sulzberger Company, at Kansas City aforesaid, in the said State of Kansas, to the said corporation common carrier, for transportation, and which had been transported by the said corporation common carrier and the said connecting railroads, in pursuance of such delivery, to divers other cities and points in divers other states of the said United States, as shown in the statement in that behalf in the said first count exhibited, that is to say, a rebate of one dollar upon each of the said forty-four car loads of dressed meats and packing house products, so as last aforesaid delivered and transported; the said freight rates and charges then and there being the freight rates and charges set forth in the joint tariffs and schedules showing the legal rates and charges established by the said corporation common carrier and the said connecting railroads and in force at the time upon their routes; copies of which last mentioned tariffs and schedules, as well as of the last mentioned contracts agreements and arrangements then in force between the said corporation common carrier and the said connecting railroads, for continuous carriage and shipment of such property from Kansas City aforesaid to the points last aforesaid, (too voluminous to be here set forth,) had been by the said corporation common carrier filed, and then were on file, with the said Interstate Commerce Commission as required by law by which granting of the said rebates and concessions in this count of this indictment mentioned the property last aforesaid was by the said corporation common carrier and its said connecting railroads transported in the said interstate commerce at less rates than those named therefor in the last-mentioned tariffs and schedules; and, further, that they the said John N. Faithorn
26 and Fred A. Wann, at the time and place of so giving the last-mentioned rebates and concessions, were acting in that behalf within the scope of their said respective employments; Against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

Fourth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the said twentieth day of May, in the year nineteen hundred and four, at the city of New York, in the State of

New York, the said The Chicago & Alton Railway Company, then a corporation common carrier engaged in the transportation of passengers and property by railroad, under contracts, agreements and arrangements with the divers other connecting railroads in the first count of this indictment named, as in the said first count set forth, and the said John N. Faithorn and Fred A. Wann, officers and agents of, and persons acting for and employed by the said common carrier as in the same count specified, unlawfully did give to the said Schwartzschild and Sulzberger Company, corporation as in the said first count aforesaid, certain rebates of the freight rates and charges theretofore by it, in items and totals to the said grand jurors unknown, collected upon, and certain concessions in respect of the transportation in interstate commerce of, certain other property which had before then, to wit, during the said month of December, in the year nineteen hundred and three, been delivered by the said Schwarzschild and Sulzberger Company, at Kansas City aforesaid, in the said State of Kansas, to the said common carrier, for transportation, and which had been conducted and transported by the said common carrier and the said connecting railroads, through the said Northern Division of the said Northern District of Illinois, in pursuance of such delivery, to divers other cities and in divers other states of the said United States, as shown in the statement in that behalf in the said first count exhibited, that is to say, a rebate of one dollar upon each of the said forty-four car loads of dressed meats and packing house products, so as last aforesaid delivered and transported; the said freight rates and charges then and there being the freight rates and charges set forth in the joint tariffs and schedules showing the legal rates and charges established by the said corporation common carrier and the said connecting railroads and in
27 force at the time upon their routes; copies of which last mentioned tariffs and schedules, as well as of the last mentioned contracts, agreements and arrangements then in force between the said corporation common carrier and the said connecting railroads, for continuous carriage and shipment of such property from Kansas City aforesaid, to the points last aforesaid, (too voluminous to be here set forth), had been by the said corporation common carrier filed and then were on file, with the said Interstate Commerce Commission as required by law; by which granting of the said rebates and concessions in this count of this indictment mentioned the property last aforesaid was by the said corporation common carrier and its said connecting railroads transported in the said interstate commerce at less rates than those named therefor in the last mentioned tariffs and schedules; and, further, that they the said John N. Faithorn and Fred A. Wann, at the time and place of so giving the last-mentioned rebates and concessions, were acting in that behalf within the scope of their said respective employments against the peace and dignity of the said United States and contrary to the form of the statute of the same in such case made and provided.

Fifth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that, before and at the several times of the com-

mitting of the several offenses in this and in the sixth, seventh and eighth counts of this indictment mentioned, by the corporation and individual defendants in those counts named. The Chicago and Alton Railway Company was a corporation organized and existing under and by virtue of the laws of the State of Illinois, and was engaged in the transportation of property by railroad, under contracts, agreements and arrangements with divers other connecting railroad companies, that is to say, the Kansas City Belt Railway Company, the Chicago Junction Railroad Company, The Lake Shore and Michigan Southern Railway Company, the Michigan Central Railroad Company, the Delaware, Lackawanna and Western Railroad Company, The New York Central and Hudson River Railroad Company, and The Louisville and Nashville Railroad Company, for a continuous carriage and shipment by railroad, from one state of the said United States to other of those states, to wit, from Kansas City, in
28 the State of Kansas, to the divers other cities and points in this count of this indictment hereafter named, and so was a corporation common carrier subject to the provisions of the Act of Congress, approved February 4, 1887, entitled "An act to regulate commerce," and of the acts amendatory thereof; that before and at the said several times John N. Faithorn was an officer and agent of, and a person acting for and employed by, the said corporation common carrier, that is to say, vice president thereof; that before and at the said several times Fred A. Wann was also an officer and agent of, and a person acting for and employed by, the said corporation common carrier, namely, general freight agent thereof; and that heretofore, to-wit, during the month of January, in the year nineteen hundred and four, the Schwarzschild and Sulzberger Company, a corporation theretofore organized and then existing under and by virtue of the laws of the State of New York, did deliver certain other property, to wit, twenty-three car loads of dressed meats and packing-house products, to the said common carrier, at Kansas City aforesaid, for transportation by the said common carrier and its said connecting railroads, to divers other cities and points in other states of the said United States, and the said common carrier did, immediately upon and in pursuance of such delivery of the said property to it, transport the same to those points, as specifically shown in the following statement, that is to say:

Car No.	Destination.	Date of Shipment.
1963	Peoria, Illinois	January 2, 1904
27890	Chicago, Illinois	" 7, "
27745	" "	" 8, "
102	Peoria, Illinois	" 9, "
27806	Chicago, Illinois	" 9, "
27796	" "	" 13, "
24773	" "	" 13, "
128	Peoria, Illinois	" 16, "
1735	" "	" 18, "
27752	Chicago, Illinois	" 20, "
35	Peoria, Illinois	" 23, "

1975	Peoria, Illinois	January	25,	1904
27999	Chicago, Illinois	"	27,	"
27704	" "	"	28,	"
27829	" "	"	29,	"
27893	" "	"	29,	"
29				
27899	Chicago, Illinois	"	30,	"
27556	" "	"	30,	"
1651	Newark, New Jersey	"	5,	"
181	" " "	"	7,	"
316	Rochester, New York	"	4,	"
171	Syracuse, New York	"	2,	"
1657	Nashville, Tennessee	"	18,	"

upon which said property in this count mentioned, and for the transportation thereof as aforesaid, the said Schwarzschild and Sulzberger Company did thereupon pay to the said common carrier, and the said common carrier did receive from the said Schwarzschild and Sulzberger Company, in items and totals to the said grand jurors unknown, the freight rates and charges set forth in the joint tariffs and schedules showing the legal rates and charges established by the said corporation common carrier and the said connecting railroads and in force at the time upon their routes, copies of which said tariffs and schedules, as well as of the said contracts, agreements and arrangements with the said connecting railroads, (too voluminous to be here set forth), had before then been by the said corporation common carrier filed, and were then on file, with the said Interstate Commerce Commission of the said United States as required by law.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said The Chicago and Alton Railway Company, corporation common carrier as aforesaid, and the said John N. Faithorn, vice president, and Fred A. Wann, general freight agent, of said common carrier as aforesaid, afterwards, to-wit, on the twentieth day of May, in the year nineteen hundred and four, at the city of Chicago, in the said Northern Division of the said Northern District of Illinois, unlawfully did offer to pay and to give to the said Schwarzschild and Sulzberger Company, corporation as aforesaid, certain rebates of the last-mentioned freight rates and charges and certain concessions in respect of the said transportation of the said property in this count mentioned, in the interstate commerce aforesaid, whereby the said property would be by the said corporation common carrier and its said connecting railroads transported in the said interstate commerce at less compensation and rates than those named therefor in the said tariffs and schedules, that is to say, a rebate, refund and concession of one dollar of the said freight rates and charges for and upon each of said carloads; and, further, that they
30 the said John N. Faithorn and Fred A. Wann were then and there acting in that behalf within the scope of their said respective employments: Against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

Sixth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the said twentieth day of May, in the year nineteen hundred and four, at the said city of Chicago, in the said Northern Division of the said Northern District of Illinois, the said The Chicago and Alton Railway Company, then a corporation common carrier engaged in the transportation of passengers and property by railroad, under contracts, agreements and arrangements with the divers other connecting railroads in the fifth count of this indictment named, as in the said fifth count set forth, and the said John N. Faithorn and Fred A. Wann, officers and agents of and persons acting for and employed by the said corporation common carrier as in the same count specified, unlawfully did grant to the said Schwarzschild and Sulzberger Company, corporation as in the said fifth count aforesaid, certain rebates of the freight rates and charges theretofore by it, in items and totals to the said grand jurors unknown, collected upon, and certain concessions in respect of the transportation in interstate commerce of, certain other property, to wit, twenty-three car loads of dressed meats and packing house products, which had before then, to wit, during the said month of January, in the year nineteen hundred and four, been delivered by the said Schwarzschild and Sulzberger Company, at Kansas City aforesaid, in the said State of Kansas, to the said corporation common carrier, for transportation, and which had been transported by the said corporation common carrier and the said connecting railroads, in pursuance of such delivery, to divers other cities and points in divers other states of the said United States, as shown in the statement in that behalf in the said fifth count exhibited, that is to say, a rebate of one dollar upon each of the said twenty-three car loads of dressed meats and packing house products, so as last aforesaid delivered and transported; the said freight rates and charges then and there being the freight rates and charges set forth in the joint tariffs and schedules showing the legal rates and charges established by the said corporation common carrier and the said connecting railroads and in force at the time upon their routes; copies of which last-mentioned tariffs and schedules, as well as of the last-mentioned contracts, agreements and arrangements then in force between the said corporation common carrier and the said connecting railroads, for continuous carriage and shipment of such property from Kansas City aforesaid to the points last aforesaid, (too voluminous to be here set forth,) had been by the said corporation common carrier filed, and then were on file, with the said Interstate Commerce Commission, as required by law; by which granting of the said rebates and concessions in this count of this indictment mentioned the property last aforesaid was by the said corporation common carrier and its said connecting railroads transported in the said interstate commerce at less rates than those named therefor in the last mentioned tariffs and schedules; and, further, that they the said John N. Faithorn and Fred A. Wann, at the time and place of so granting the last-mentioned rebates and concessions, were in that behalf acting within the scope of their said

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respective employments: Against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

Seventh Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the said twentieth day of May, in the year nineteen hundred and four, at the said city of Chicago, in the said Northern Division of the said Northern District of Illinois, the said The Chicago and Alton Railway Company, then a corporation common carrier engaged in the transportation of passengers and property by railroad, under contracts, agreements and arrangements with the divers other connecting railroads in the fifth count of this indictment named, as in the said fifth count set forth, and the said John N. Faithorn and Fred A. Wann, officers and agents of and persons acting for and employed by the said corporation common carrier as in the same count specified, unlawfully did give to the said Schwarzschild and Sulzberger Company, corporation as in the said fifth count aforesaid, certain rebates of the freight rates and charges
32 theretofore by it in items and totals to the said grand jurors unknown, collected upon, and certain concessions in respect of the transportation in interstate commerce of, certain other property, to wit, twenty three car loads of dressed meats and packing house products, which had before then, to wit, during the said month of January, in the year nineteen hundred and four, been delivered by the said Schwarzschild and Sulzberger Company, at Kansas City, aforesaid, in the said state of Kansas, to the said corporation common carrier, for transportation, and which had been transported by the said common carrier and the said connecting railroads, in pursuance of such delivery, to divers other cities and points in divers other states of the said United States, as shown in the statement in that behalf in the said fifth count exhibited, that is to say, a rebate of one dollar upon each of the said twenty three car loads of dressed meats and packing house products so as last aforesaid delivered and transported; the said freight rates and charges then and there being the freight rates and charges set forth in the joint tariffs and schedules showing the legal rates and charges established by the said corporation common carrier and the said connecting railroads and in force at the time upon their routes; copies of which last-mentioned tariffs and schedules, as well as of the last mentioned contracts, agreements and arrangements then in force between the said corporation common carrier and the said connecting railroads, for continuous carriage and shipment of such property from Kansas City aforesaid to the points last aforesaid, (too voluminous to be here set forth,) had been by the said corporation common carrier filed, and then were on file, with the said Interstate Commerce Commission, as required by law; by which granting of the said rebates and concessions in this count of this indictment mentioned the property last aforesaid was by the said corporation common carrier and its said connecting railroads transported in the said interstate

commerce at less rates than those named therefor in the last-mentioned tariffs and schedules; and, further that they the said John N. Faithorn and Fred A. Wann, at the time and place of so giving the last-mentioned rebates and concessions, were acting in that behalf within the scope of their said respective employments: Against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

33 *Eighth Count.*

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that on the said twentieth day of May, in the year nineteen hundred and four, at the city of New York, in the State of New York, the said The Chicago and Alton Railway Company, then a corporation common carrier engaged in the transportation of passenger and property by railroad, under contracts, agreements and arrangements with the divers other connecting railroads in the fifth count of this indictment named, as in the said fifth count set forth, and the said John N. Faithorn and Fred A. Wann, officers and agents of, and persons acting for and employed by the said corporation common carrier as in the same count specified, unlawfully did give to the said Schwarzschild and Sulzberger Company, corporation as in the said fifth count aforesaid, certain rebates of the freight rates and charges theretofore by it, in items and totals to the said grand jurors unknown, collected upon, and certain concessions in respect of the transportation in interstate commerce of, certain other property, to wit, twenty-three carloads of dressed meats and packing house products, which had before then, to wit, during the said month of January, in the year nineteen hundred and four, been delivered by the said Swarzschild and Sulzberger Company, at Kansas City aforesaid, in the State of Kansas, to the said corporation common carrier, for transportation, and which had been conducted and transported by the said common carrier and the said connecting railroads, through the said Northern Division of the said Northern District of Illinois, in pursuance of such delivery, to divers other cities and in divers other states of the said United States, as shown in the statement in that behalf in the said fifth count exhibited, that is to say, a rebate of one dollar upon each of the said twenty-three car loads of dressed meats and packing house products so as last aforesaid delivered and transported; the said freight rates and charges then and there being the freight rates and charges set forth in the joint tariffs and schedules showing the legal rates and charges established by the said corporation common carrier and the said connecting railroads and in force at the time upon their routes; copies of which last mentioned tariffs and schedules, as well as of the last-mentioned
34 contracts, agreements and arrangements then in force between the said corporation common carrier and the said connecting railroads, for continuous carriage and shipment of such property from Kansas City aforesaid to the points last aforesaid, (too voluminous to be here set forth), had been by the said corporation common carrier filed, and then were on file, with the Interstate Commerce

Commission, as required by law; by which granting of the said rebates and concessions in this count of this indictment mentioned the property last aforesaid was by the said corporation common carrier and its said connecting railroads transported at less rates than those named therefor in the last-mentioned tariffs and schedules; and, further, that they the said John N. Faithorn and Fred A. Wann, at the time and place of so giving the last-mentioned rebates and concessions, were acting in that behalf within the scope of their said respective employments: Against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

Ninth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that before and on the first day of September, in the year nineteen hundred and four, the said The Chicago and Alton Railway Company was a corporation organized and existing under the laws of the State of Illinois, and was engaged in the transportation of passengers by railroad between certain states of the said United States, that is to say, Illinois and Missouri, and so was a corporation common carrier subject to the provisions of the Act of Congress, approved February 4, 1887, entitled "An act to regulate commerce," and of the acts amendatory thereof; that before and on the day in this count of this indictment first aforesaid, John N. Faithorn was an officer and agent of, and a person acting for and employed by, the said corporation common carrier, that is to say, vice president thereof; that before and on that day Fred A. Wann was also an officer and agent of, and a person acting for and employed by, the said corporation common carrier, namely, general freight agent thereof; and that before the said first day of September, in the year nineteen hundred and four, to wit, at divers times between
35 the first day of January, in the year nineteen hundred and three, and the said first day of September, in the year nineteen hundred and four, the Schwarzschild and Sulzberger Company, a corporation theretofore organized and then existing under and by virtue of the laws of the State of New York, did pay to the corporation common carrier in this count mentioned divers large sums of money, together amounting to the sum of three thousand and five hundred dollars, as and for passenger fares of divers of the officers agents and servants of the said Schwarzschild and Sulzberger Company, who traveled between the said states of Illinois and Missouri, during the period aforesaid, upon the railroad of the said corporation common carrier, the particulars of which said traveling, reference being had to the names of the said officers, agents and servants of the said Schwarzschild and Sulzberger Company, and to the dates of their said travel, and to the points from and to which they so traveled, are to the said grand jurors unknown; the said fares having been the fares set forth in the tariffs and schedules showing the legal passenger fares and charges between the said points established by the said corporation common carrier and in force at the several times

of the payment of the same upon its route, which had been filed, and were at those times on file, with the Interstate Commerce Commission of the said United States, as required by law.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said The Chicago and Alton Railway Company, corporation common carrier as aforesaid, and the said John N. Faithorn, vice president, and Fred A. Wann, general freight agent, of the said corporation common carrier as aforesaid, on the said first day of September, in the year nineteen hundred and four, at the *the* city of Chicago, in the said Northern Division of the said Northern District of Illinois, unlawfully did give to the said Schwarzschild and Sulzberger Company, corporation as aforesaid, a rebate of the whole of the said passenger fares and charges and a concession in respect of the transportation of the said passengers, in the interstate commerce aforesaid, whereby the said passengers were transported by the said corporation common carrier at less fares and rates than those named in the said tariffs and schedules, that is to say, without any charge whatever; and, further, that they the said John N. Faithorn, and Fred A. Wann were then and there acting in
36 that behalf within the scope of their said respective employments: Against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

Tenth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that before and on the first day of September, in the year nineteen hundred and four, the said The Chicago and Alton Railway Company was a corporation organized and existing under the laws of the state of Illinois, and was engaged in the transportation of passengers by railroad between certain states of the said United States, that is to say, Illinois and Missouri, and so was a corporation common carrier subject to the provisions of the Act of Congress, approved February 4, 1887, entitled "An act to regulate commerce," and of the acts amendatory thereof; that before and on the day in this count of this indictment first aforesaid, John N. Faithorn was an officer and agent of, and a person acting for and employed by, the said corporation common carrier, that is to say, vice president thereof; that before and on that day Fred A. Wann was also an officer and agent of, and a person acting for and employed by, the said corporation common carrier, namely, general freight agent thereof; that before and on the said first day of September, in the year nineteen hundred and four, and since that day, the Schwarzschild and Sulzberger Company, a corporation theretofore organized and then existing under and by virtue of the laws of the State of New York, was and has been a large shipper of property, to-wit, dressed meats and packing house products, in interstate commerce, over the lines of railroad belonging to and operated by the said corporation common carrier, and was and has been a profitable

patron of the said corporation common carrier; and that before and on the said first day of September, in the year aforesaid, to wit, on divers days and at divers times between the first day of January, in the year nineteen hundred and three, and the said first day of September, in the year nineteen hundred and four, the said Schwarzschild and Sulzberger Company did pay to the corporation common carrier in this count mentioned divers large sums
37 of money, together amounting to the sum of three thousand and five hundred dollars, as and for passenger fares of divers of the officers, agents and servants of the said Schwarzschild and Sulzberger Company, who traveled between the said states of Illinois and Missouri, during the period aforesaid, upon the railroad of the said corporation common carrier, the particulars of which said traveling, reference being had to the names of the said officers, agents and servants of the said Schwarzschild and Sulzberger Company, and to the dates of their said travel, and to the points from and to which they so traveled, are to the said grand jurors unknown; the said fares having been the fares set forth in the tariffs and schedules showing the legal passenger fares and charges between the said points established by the said corporation common carrier and in force at the several times of the payment of the same upon its route, which had been filed, and were at those times on file, with the Interstate Commerce Commission of the said United States, as required by law.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said The Chicago and Alton Railway Company, a corporation common carrier as aforesaid, and the said John N. Faithorn, vice president, and Fred A. Wann, general freight agent, of the said corporation common carrier as aforesaid, on the said first day of September, in the year nineteen hundred and four, at the City of Chicago, in the said Northern Division of the said Northern District of Illinois, to induce the said Schwarzschild and Sulzberger Company to continue shipping its said property in such interstate commerce over the railroad of the said corporation common carrier and patronizing the same, unlawfully did give to the said Schwarzschild and Sulzberger Company, corporation as aforesaid, a rebate of the whole of the said passenger fares and charges and a concession in respect of the transportation of the said passengers, in the interstate commerce aforesaid, whereby the said passengers were transported by the said corporation common carrier at less fares and rates than those named in the said tariffs and schedules, that is to say, without any charge whatever; and, further, that they the said John N. Faithorn and Fred A. Wann were then and there acting in that behalf within the scope of their said respective employments; Against the peace and dignity of the said
38 United States, and contrary to the form of the statute of the same in such case made and provided.

(Signed) C. B. MORRISON,
United States Attorney.

Endorsed: No. 3627 United States District Court Northern District of Illinois, Northern Division. The United States of America *vs.* The Chicago & Alton Railway Company, *et al.* Indictment on Act Feb. 4, 1887, as amended by Act of Feb. 19, 1903 (Interstate Commerce Laws) A true bill Willis M. Kimball, Foreman Filed in open court this 13th day of December A. D. 1905. T. C. MacMillan, Clerk Bail $10,000. S. H. Bethea, Judge.

And afterwards, towit, on the 9th day of April, A. D. 1906, the following order was had and entered of record in said cause, towit:

3627.

THE UNITED STATES
vs.
THE CHICAGO & ALTON RAILWAY COMPANY, JOHN N. FAITHORN, and FRED A. WANN.

Comes the United States by C. B. Morrison, Esq., United States Attorney, come also the defendants John N. Faithorn and Fred A. Wann in their own proper persons and said defendants being arraigned upon the indictment filed herein against them pleads not guilty thereto; and the defendant The Chicago & Alton Railway Company by its attorneys enters its plea of not guilty.

And afterwards, towit, on the 2nd day of July, A. D. 1906 an order was entered in said cause, the same being in the words and figures following, towit:

39 3627.

THE UNITED STATES
vs.
CHICAGO & ALTON RAILWAY COMPANY, FRED A. WANN, and JOHN N. FAITHORN.

Come the parties by their attorneys and the defendants Fred A. Wann and John N. Faithorn in their own proper persons and the defendants having heretofore interposed their pleas of not guilty to the indictment filed herein against them and this cause now coming on for trial for their defense put themselves upon the country, whereupon comes a jury of good and lawful men, towit, Chas. G. Arnold, P. P. Bliss, Chas. Bateman, John Spiller, W. S. Greene, Willis S. Herrick, Wm. F. Lenpold, P. B. Manning, B. H. Myers, S. P. Nissen, John Rudolph and Albert Reidy who are duly elected, empanelled and sworn herein a true verdict to render according to the law and the evidence and the trial of this cause proceeds and during the examination of witnesses the usual hour of adjournment having arrived it is Ordered by the court that the further trial of this cause be continued until tomorrow morning at ten o'clock.

And afterwards, towit, on the 3rd day of July A. D. 1905 the following order was had and entered of record in said cause before the Honorable Kenesaw M. Landis, Judge, towit:

3627.

THE UNITED STATES
vs.
CHICAGO & ALTON RAILWAY COMPANY, FRED A. WANN, JOHN N. FAITHORN.

This being the day and hour to which the further trial of this cause was on yesterday continued, come again the parties by their attorneys and the jury who were duly elected, empanelled and sworn herein, and the trial proceeds and at the close of the testimony of witnesses on behalf of the defendants the usual hour of adjournment having arrived, it is

Ordered by the court that the further trial of this cause be continued until July 5, 1906 at ten o'clock A. M.

40 And afterwards, towit, on the 5th day of July, 1906, the following order was had and entered of record in said cause before the Honorable Kenesaw M. Landis, Judge, towit.

3627.

THE UNITED STATES
vs.
CHICAGO & ALTON RAILWAY COMPANY, FRED A. WANN, JOHN N. FAITHORN.

This being the day and hour to which the further trial of this cause was on Tuesday, July 3, 1906, continued come again the parties by their attorneys and the jury who were duly elected empanelled and sworn herein, whereupon on motion it is Ordered by the court that the further trial of this cause be continued until tomorrow morning at ten o'clock.

And afterwards, towit, on the 6th day of July, 1906, the following order was had and entered of record in said cause before the Honorable Kenesaw M. Landis, Judge, towit.

3627.

THE UNITED STATES
vs.
CHICAGO & ALTON RAILWAY COMPANY, FRED A. WANN, JOHN N. FAITHORN.

This being the day and hour to which the further trial of this cause was on yesterday continued come again the parties by their

attorneys and comes also the jury who were duly elected, empanelled and sworn herein and said jury having heard the evidence by the parties adduced, arguments of counsel and charge of the court, retire to their room to consider of their verdict and afterwards return into court and render their verdict and on their oath do say, We, the jury, find the defendants guilty as charged in the first eight counts of the indictment and not guilty as charged in the ninth and tenth counts of the indictment, whereupon the defendants by their attorneys enter their motion for a new trial herein and the hearing of said motion for a new trial is by the court continued until tomorrow morning at 9:30 o'clock.

41 And afterwards, towit, on the 7th day of July, A. D. 1906, the following order was had and entered of record in said cause before the Honorable Kenesaw M. Landis, Judge, towit:

3627.

THE UNITED STATES
vs.
CHICAGO AND ALTON RAILWAY COMPANY, FRED A. WANN, JOHN N. FAITHORN.

This cause coming on to be heard on the motion of the defendants for a new trial herein come the parties by their attorneys and the court having heard the arguments of counsel to conclusion takes the same under advisement.

And afterwards, towit on the 11th day of July, A. D. 1906 the following order was had and entered of record in said cause before the Honorable Kenesaw M. Landis, Judge, towit:

3627.

THE UNITED STATES
vs.
CHICAGO AND ALTON RAILWAY COMPANY, FRED A. WANN, JOHN N. FAITHORN.

This cause coming on again to be heard on the motion of the defendants for a new trial herein, come the parties by their attorneys and the court being fully advised in the premises Orders that the said motion for a new trial be and the same hereby is overruled and denied.

Whereupon the defendants by their counsel enter their motion in arrest of judgment, and after hearing the arguments of counsel and being fully advised in the premises, the court overrules and denies said motion in arrest of judgment.

And afterwards, towit, on the 11th day of July, 1906, the following order was had and entered of record in said cause before the Honorable Kenesaw M. Landis, Judge, towit:

42 3627.

THE UNITED STATES
vs.
CHICAGO & ALTON RAILWAY COMPANY, FRED A. WANN, JOHN N. FAITHORN.

Comes the United States by C. B. Morrison, Esq., United States Attorney, come also the defendants the Chicago and Alton Railway Company by its attorneys, and Fred A. Wann and John N. Faithorn in their own proper persons and by their attorneys to have the sentence and judgment of the court pronounced upon them they having heretofore, towit: on the sixth day of July, A. D. 1906, one of the days of this term of court been adjudged guilty by a jury in due form of law as charged in the first eight counts of the indictment filed herein against them and the said defendants being asked by the court if they or either of them have anything to say why the sentence and judgment of the court should not now be pronounced upon them and showing no good and sufficient reasons why sentence and judgment should not be pronounced it is therefore considered by the court and as the sentence and judgment of the court upon the verdict of guilty so rendered herein by the jury as aforesaid that the defendant the Chicago and Alton Railway Company forfeit and pay to the United States a fine in the sum of forty thousand dollars besides the costs herein; that the defendant Fred A. Wann forfeit and pay to the United States a fine in the sum of ten thousand dollars besides the costs herein and that John N. Faithorn forfeit and pay to the United States a fine in the sum of ten thousand dollars besides the costs herein for which let execution issue.

Whereupon said defendants by their attorneys enter their motion for a writ of error to the United States Circuit Court of Appeals for the Seventh Circuit and the Court grants ninety days' time within which to present and file a bill of exceptions and fixes the bonds of the defendants as follows: Chicago and Alton Railway Company forty thousand dollars, Fred A. Wann ten thousand dollars, John N. Faithorn ten thousand dollars.

And afterwards, towit, September 4, A. D. 1906, there was filed in the Clerk's Office of said Court in said matter Bill of Exceptions, the same being in the words and figures following, towit:

43 UNITED STATES OF AMERICA.
Northern District of Illinois, ss:

In the District Court of the United States for the Northern District of Illinois, Northern Division.

3627.

UNITED STATES OF AMERICA
vs.
CHICAGO & ALTON RAILWAY COMPANY ET AL.

Bill of Exceptions.

Endorsed: Filed Sep. 4 Fil'd at 1:40 o'clock P. M. T. C. MacMillan, Clerk.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

In the District Court of the United States for the Northern District of Illinois, Northern Division, July Term, A. D. 1906.

3627.

UNITED STATES OF AMERICA
vs.
CHICAGO & ALTON RAILWAY COMPANY ET AL.

Bill of Exceptions.

Be it remembered that heretofore to-wit, on the 2nd day of July, A. D. 1906, being one of the days of said term of said court, before his Honor Kenesaw M. Landis, one of the judges of said court, and a jury, this cause came on for trial upon the pleadings heretofore filed herein.

Charles B. Morrison, Esq., Appearing for the Government.

Messrs. Winston, Payne & Strawn and R. M. Shaw, Esq., Appearing for defendants.

And thereupon the Government to maintain the issues on its part as to the first eight counts in the said indictment offered evi-
44 dence tending to show that other industrial companies owning switch tracks in Kansas City connecting with the Belt Line in question, and situated similarly to the plant of the Schwarzschild and Sulzberger Company, were not paid by the Chicago & Alton Railway Company, or by any other Railway Company connecting with the said Belt Line, any trackage charge for the use of such switch tracks.

To the introduction of which said testimony the defendants, and each of them, by their counsel, then and there objected, and the court sustained such objection.

Mr. Morrison then on the part of the Government offered in evidence the stipulation of the parties, which was then and there received and read in evidence to the court and jury, and is in the words and figures following, to-wit:

NORTHERN DISTRICT OF ILLINOIS, *Northern Division*, ss:

In the District Court of the United States of America for the Northern District of Illinois, Northern Division.

UNITED STATES OF AMERICA
vs.
CHICAGO & ALTON RAILWAY COMPANY, JOHN N. FAITHORN, and FRED A. WANN.

It is stipulated and agreed that during all of the time covered by the allegations in the indictment, The Chicago and Alton Railway Company was a corporation organized under the laws of the State of Illinois, and was engaged in the transportation of property by railroad, under contracts and agreements with other connecting railroad companies, to-wit: the Kansas City Belt Railway Company; the Chicago Junction Railroad Company; the Indiana, Illinois and Iowa Railroad Company; the New York Central and Hudson River Railroad Company; the Lehigh Valley Railroad Company; the Delaware, Lackawanna and Western Railroad Company; the New York, Chicago and St. Louis Railroad Company, and the Pittsburg, Cincinnati, Chicago and St. Louis Railway Company, for a
45 continuous carriage and shipment by railroad from Kansas City, in the State of Kansas, to points in Illinois, Ohio, Pennsylvania, New Jersey and New York, specifically shown in the tables contained in the first and fifth counts of the indictment, which show the car numbers and destinations, and the dates of shipment; that during all of said time the defendant, John N. Faithorn was an officer and agent of, and employed by the said The Chicago and Alton Railway Company, that is to say, he was Vice President thereof, and that during all of said time, Fred A. Wann was an officer and agent of, and acting for and employed by the said The Chicago and Alton Railway Company, that is to say, he was General Freight Agent of the said Company; and that during all of said time the said Schwarzschild and Sulzberger Company was a corporation, before then organized and then existing under the laws of the State of New York, and was engaged in the manufacture, sale and shipment of dressed beef and packing house products, with one of its plants located in Kansas City, in the State of Kansas, and did at said Kansas City, Kansas, deliver to and ship by the said The Chicago and Alton Railway Company, as alleged in the indictment, the cars loaded with dressed beef and packing house products on the dates mentioned in said tables, and as alleged in the indictment, and which were to be and were in fact transported by the said The Chicago and Alton Railway Company, to the places named in said tables, by rail over its line and connections.

That the said Kansas City Belt Railway Company (hereinafter called the Belt Line), was during all of the said time located in part in the State of Kansas, and in part in the State of Missouri, at Kansas City, Kansas, and Kansas City, Missouri, and was commonly known and called the Belt Line, and that it served industries located on and near its lines in Kansas City, Kansas, and Kansas City, Missouri, and among them the said Schwarzschild and Sulzberger Company; that the Belt Line was a switching line and received cars of freight to be transported by various railroads connecting with it the Belt Line, to various other states and territories, and when it so received cars for shipment, it switched the same to the railroad tracks of the railroad with which it connected and which was to transport the freight, that all of the cars mentioned in said tables were received by the said Belt Line from the said Schwarzschild and Sulzberger Company, and by the Belt Line switched to the tracks of the said The Chicago and Alton Railway Company,
46 and by that Company transported by its line and its said connecting lines to the points of destination named in the said tables.

That the said Belt Line had fixed, published and filed its tariffs of rates with the Interstate Commerce Commission as is required by law, of all carriers engaged in the transportation of property in interstate commerce, and that the rates so fixed and published for the said Schwarzschild and Sulzberger Company, at Kansas City, Kansas, was three dollars per car, for every car load transported by the Belt Line to the connection of the said The Chicago & Alton Railway Company with said Belt Line; and that said tariff rate was on file as aforesaid and in full force and effect during all of *of* the times when the shipments specified in the indictment and the payments of one dollar per car as specified in the indictment, were made that it, the said The Chicago and Alton Railway Company had published and filed with the Interstate Commerce Commission, as alleged in the indictment and as is required by law, its tariffs of rates and joint tariffs of rates, from Kansas City to the various points mentioned in the said tables, and which tariffs of rates were on file and in full force and effect during all of said time covered by the indictment.

That by an arrangement and agreement the said The Chicago and Alton Railway Company, and the said Belt Line, the said three dollars switching charge for switching said cars containing the products of the Schwarzschild and Sulzberger Company, was absorbed by the said The Chicago and Alton Railway Company, that is to say, that the shipper, the Schwarzschild and Sulzberger Company, paid to the said The Chicago and Alton Railway Company the full and lawful tariff rates from Kansas City to the said points of destination, and the said The Chicago and Alton Railway Company, by virtue of said agreement, paid to the said Belt Line the three dollars for each car of freight so transported.

That many years prior to the first day of January, 1901, the Schwarzschild and Sulzberger Company constructed, at their own expense, and maintained from year to year thereafter, at their own ex-

pense, a large amount of railroad track and switches aggregating in all,—railroad track and switches,—nearly a mile and a half in length (see Exhibit "B") which said railroad track and switches were used for switching purposes within the plants of the said Schwarzschild and Sulzberger Company and to connect with the tracks of the Belt Line; that the said switches and railroad
47 track are all located on the property of the said Schwarzschild & Sulzberger Company, upon which its said plant is situated, and the switches of the said Schwarzschild and Sulzberger Company connect with the Belt Line or with switches of the Belt Line constructed for the purpose of connecting with the Schwarzschild and Sulzberger Company's switches; that the said investment of the said Schwarzschild and Sulzberger Company in said railroad track and switches and in the right-of-way upon which the same were laid, constructed and maintained, amounted to, exclusive of maintenance charges and taxes, the sum of Seventy-five Thousand Dollars ($75,000); that the maintenance charges and taxes per year, from the time of the construction of the said railroad track and switches, amounted to, in each year, exclusive of interest on the cost of investment, the sum of Twelve Hundred Dollars ($1200) per year.

That for many years prior to the first day of January, 1901, the switching tariff of the said Belt Line, for the service rendered by them in switching cars to and from the plants of the Schwarzschild and Sulzberger Company, to the rails of trunk lines carrying said freight east from Kansas City, had been four dollars ($4) per car; that the said Belt Line could not reach the buildings and loading docks of the said Schwarzschild and Sulzberger Company at its said plant without using the railroad track and switches, etc., so owned, constructed and maintained by the said Schwarzschild and Sulzberger Company, and that said Schwarzschild and Sulzberger Company had, by virtue of an arrangement between it and said Belt Line received from the said Belt Line for many years prior to the first day of December, 1901, out of the said four dollars per car rate, one dollar a car for all loaded cars switched from its plant over its rails to the Belt Line; that no charge or payment was ever, at any time, made for empties switched into the plant; that the said The Chicago and Alton Railway Company, for many years prior to the first day of January, 1901, had absorbed said switching charge of $4.00 per car, and had, in each instance, for each car of freight hauled by it from Kansas City to points along its line and the lines of its connections, paid to said Belt Line said switching charge of four dollars per car, and that in each instance, out of the sum so paid by The Chicago and Alton Railway Company, the sum of one dollar per car was paid by said Belt Line to the said Schwarzschild and Sulz-
48 berger Company, and that the said Chicago and Alton Railway Company knew that said sum of one dollar per car was so paid to the said Schwarzschild and Sulzberger Company.

That on or about the first day of January, 1901, the said Schwarzschild and Sulzberger Company requested the said The Chicago and Alton Railway Company to pay to it direct, instead of through the medium of the Belt Line, the said sum of One Dollar ($1.00) per

car, for all loaded cars hauled by the said The Chicago and Alton Railway Company for the Schwarzschild and Sulzberger Company, and thereafter the said The Chicago and Alton Railway Company discontinued mailing to the Belt Line the one dollar ($1.00) per car for the Schwarzschild and Sulzberger Company, and the said The Chicago and Alton Railway Company, by F. A. Wann, below mentioned, agreed with the said Schwarzschild and Sulzberger Company to thereafter mail said One Dollar per car to the said Schwarzschild and Sulzberger Company direct, instead of to the Belt Line for the use of the said Schwarzschild and Sulzberger Company; that thereafter the said The Chicago and Alton Railway Company did send to the Belt Line the sum of Three Dollars per car, for all cars switched by it to The Chicago and Alton tracks, and to the Schwarzschild and Sulzberger Company the Sum of One Dollar per car, for each car switched from the said plant of the Schwarzschild and Sulzberger Company.

That on said first day of January, 1901, the said Belt Line changed its published switching tariffs from Four to Three Dollars per car, that from said first day of January, 1901, down to and including the shipment set forth in said indictment, the said The Chicago and Alton Railway Company continued to pay to the said Schwarzschild and Sulzberger Company the sum of One Dollar per car for such cars as were hauled for the said Schwarzschild and Sulzberger Company by the said The Chicago and Alton Railway Company from Kansas City east, including the cars mentioned in the indictment, and to pay to the said Belt Line the sum of Three Dollars per car for the services rendered by it.

That Fred A. Wann was the General Freight Agent of said The Chicago and Alton Railway Company, and as such made the said agreement with the Schwarzschild and Sulzberger Company for the payment of said One Dollar per car directly to the said Schwarzschild and Sulzberger Company; and they, the said John N. Faithorn, Vice President, and the said Fred A. Wann, as such officers of said
49 Railway Company, caused to be paid by The Chicago and Alton Railway Company the said sum of One Dollar per car for the respective cars mentioned in the indictment; that the said One Dollar per car was paid in accordance with and pursuant to the said agreement to that effect made as aforesaid, on or about the first day of January, 1901; that the said Fred A. Wann was acting in the scope of his employment and authority for the said The Chicago and Alton Railway Company, in respect to the making of said arrangement and the payments aforesaid, and as to such payments the said John N. Faithorn was also acting within the scope of his employment and for the Chicago and Alton Railway Company; that the said payments were charged up on the books of said The Chicago and Alton Railway Company as and for "terminal allowances" in Kansas City and that attached hereto and marked "Exhibit A" are the original vouchers, approved by the said John N. Faithorn and Fred A. Wann as such officers, in the matter of the payments aforesaid.

It is further stipulated and agreed that the blue print attached

herewith and marked "Exhibit B" gives the correct boundary lines of the Schwarzschild and Sulzberger Company's property located in Kansas City, Kansas, and correctly sets forth the tracks and property of the Schwarzschild and Sulzberger Company and of the said Belt Line. The tracks of the said Schwarzschild and Sulzberger Company on the blue print are marked in black, and the tracks of the said Kansas City Suburban Belt Line are marked in red, called in the indictment the Kansas City Belt Railway; and the tracks of the Kansas City Belt Railway are marked in yellow; that the Kansas City Suburban Belt Line is also called the Kansas City Southern Railway Company; and it is agreed that the Kansas City Belt Railway, mentioned in the indictment, and the Kansas City Suburban Belt Line, and the Kansas City Southern Railway Company are one and the same; and that the Kansas City Belt Railway Company whose tracks appear by the yellow marks on "Exhibit B," is another and different Belt Railway Company, and is not the Belt Railway Company referred to in the indictment. It is also agreed that no advantage shall be taken of the fact that the Kansas City Southern Railway Company, otherwise called the Kansas City Suburban Belt Line, are described in the indictment as the Kansas City Belt Railway Company, and any variance in that respect is hereby waived.

It is further agreed that the boundaries of the Schwarzschild and Sulzberger Company's plant are properly shown in Exhibit "B," and that the said property is bounded on the east by the Kansas River, and on the south by the line of dashes, and on the west by the inner white line which starts at the northwest corner of the company's property and extends southwesterly 326.53 feet and then jogs easterly 17 and a fraction feet, and thence extends southwesterly again 308.25 feet, and thence jogs easterly past the tracks of the Kansas City Southern Railway Company, and then southwesterly to the south boundary; that it is bounded on the north by Osage Avenue, but that the Schwarzschild and Sulzberger Company, by some immaterial arrangement, occupies a portion of the premises as shown by said exhibit north of Osage Avenue.

That the facts stipulated in the paragraph next succeeding are true, provided, however, that the defendants insist that they are incompetent, irrelevant and immaterial to the issues in this case, and the parties hereby stipulate that they are stipulated facts subject to the decision of the court upon the trial of this case as to their relevancy, competency and materiality. The facts so stipulated are as follows:

That the said Schwarzschild and Sulzberger Company is a corporation organized to do a packing business and is not a railroad corporation, and that no tariff of rates or agreement in respect thereto had been fixed or made or filed with the Interstate Commerce Commission of the United States, prior to or at the time of any of the shipments mentioned in the indictment, pertaining to the said railroad track and switches of the said Schwarzschild and Sulzberger Company.

That the schedules required by law to be established and printed and kept open for public inspection by the carrier and which were

n fact so established, printed and kept open showing the charges for ransportation of the product shipped by the said Schwarzschild and Sulzberger Company to the points of destination of such shipment, as nentioned in the indictment, did not state separately or otherwise, ny terminal charges whatever for or on account of said switches and ailroad track of the said Schwarzschild and Sulzberger Company.

It is further stipulated and agreed that the tracks owned and maintained by the said Schwarzschild and Sulzberger Company are constructed upon its own property and that it had the lawful right to construct and maintain the same; that the said tracks and
51 switches so owned and maintained by it, are not used for any purpose except the handling of the business moving in and out of the said Schwarzschild and Sulzberger Company's plant; and for switching purposes within the plant.

It is further stipulated and agreed that of the total freight shipped by the Schwarzschild and Sulzberger Company out of the Kansas City house, The Chicago and Alton Railway Company carried thirty-two and six tenths per cent. (32.6 per cent.). The Great Western Railway Company fifteen per cent. (15 per cent.); other competing lines thirty-one and four tenths per cent. (31.4 per cent.); and the balance went to points not reached by The Chicago and Alton Railway Company; and that the total number of loaded cars switched out of the Schwarzschild and Sulzberger plant at Kansas City, from January 1, 1901, to February 1, 1904, inclusive, is 19,814; that the said tracks of the Schwarzschild and Sulzberger Company are also used for all switching purposes made necessary in the handling of the business of the plant.

The United States may, upon the trial of this case, in addition to the foregoing facts, introduce evidence proving or tending to prove the fact as to whether or not the Schwarzschild and Sulzberger Company received the one dollar a car or other payment from any other railroad or whether or not other packing plants similarly situated in Kansas City, Kansas, or Kansas City, Missouri, received the one dollar per car from The Chicago and Alton Railway Company, or from any other railroad or railroads, or from any belt or switching line, subject, however, to the right of the defendants and each of them, to object to such evidence on the grounds of its incompetency, irrelevancy and immateriality.

The defendants, and any or either of them, may, in addition to the foregoing facts, introduce evidence, if it shall be held competent by the court, providing or tending to prove the exact agreement which was made by and between the Belt Line and the Schwarzschild and Sulzberger Company, prior to or during the year 1901, by reason of which the said Belt Line paid to the Schwarzschild and Sulzberger Company One Dollar per car for all loaded cars hauled out of the plant of the Schwarzschild and Sulzberger Company; and said defendants and each of them, may also introduce evidence, if it shall be held competent by the court, proving or tending to prove the exact agreement which was made on or about the first day of January, 1901, by and between the Schwarzschild and Sulzberger
52 Company and The Chicago and Alton Railway Company, as the result of which the said Railway Company thereafter paid

to the Schwarzschild and Sulzberger Company direct One Dollar per car for all loaded cars hauled by said Railway Company for the said Schwarzschild and Sulzberger Company; and the said defendants, and each of them, may, in addition to the foregoing facts, introduce evidence, if it shall be held competent by the court, tending to prove the reasonable rental value for the years 1901, 1902, 1903, and the month of January, 1904, of the roadbed, tracks and switches owned, constructed and maintained by the said Schwarzschild and Sulzberger Company. And the said defendants, or either of them, may, if it shall be held competent by the court, also introduce evidence proving or tending to prove what, if any, charge would have been a reasonable charge during the period covered by this indictment, for the Schwarzschild and Sulzberger Company to have made for the use of its tracks as set forth herein, maintained and furnished by them as aforesaid. If evidence is admitted by virtue of this paragraph it may be rebutted by the Government if it sees fit.

It is the intention of this agreement that the Government shall have the right to object to all the above mentioned evidence which may be offered by the defendants and that the evidence shall not be admitted unless the court before whom this case shall be tried shall hold that the same is competent.

It is further agreed that all of the matters and things herein stated took place within the period covered by the indictment, except when otherwise herein stated, and that this court has jurisdiction, and that if it shall be found that any offense has been committed, it was committed within the Northern Division of the Northern District of Illinois, and that the above statement is all the evidence applicable to the first eight counts of the indictment, except upon those subjects above left open for proof upon the trial.

This stipulation is made for the purpose of this case, and shall not be binding upon either the United States of America or any or either of the defendants in any other proceedings and at any other time or place whatsoever.

C. B. MORRISON,
U. S. Att'y, Attorney for Plaintiff.
WINSTON, PAYNE & STRAWN,
Attorney for Defendants.

53 Form 134. 10M. 5-04.

Accounts Payable.

April 1904

The Chicago & Alton Railway Company,
Ys To Schwarzschild and Sulzberger Co., 59720 Dr.
Address Union Stock Yards,
Chicago, Ills

Pay same direct. 1000

1904 For the following, as per bill rendered, filed in the Auditor's office, viz:

For refund of Terminal Charges assessed at Kans City month of January, 1904 247 cars @ $1.00 per car $247 00

This voucher can be used as a check payable at the Illinois Trust & Savings Bank, Chicago. Sign Original and Duplicate (if any.) Deposit at Once. Make no alterations or erasures. Do not Detach Duplicates.

Paid
May 20 1904
Asst. Treasurer
Chicago & Alton Ry. Co.

Correct
6806
Correct:
FRED A. WANN.

Approved:
J. N. FAITHORN,
Vice President.
CH. H. DAVIS, *Auditor.*

Received May 18 1904, of The Chicago & Alton Railway Company, Two hundred and forty-seven Dollars. In full for the above account.
$247.00

SCHWARZSCHILD & SULZBERGER .COMPANY,
(S'gn) GULSBERG, *Cashier.*

NOTE.—The above receipt must be dated and signed by the party in whose favor this voucher is made, or when signed by another party, the authority for so doing must in all cases, accompany it.

54 (On the back:) Treasurer's No. 11181 Pay to State Bank of Chicago, Chicago, Ill., Or Order, Columbia Bank, New York. W. S. Griffith, Cashier. The Illinois Trust & Savings Bank, Chicago, Ill., will pay this voucher when original & duplicate if any are properly signed. H. E. R. Wood, Asst. Treas. Pay to Columbia Bank, or Order. Sgn. Guelsberg, Schwarzschild & Sulzberger Co. F. Sulzberger, Treas. Paid Through the Chicago Clearing 18 House May 20, 1904 All prior endorsements guaranteed State Bank of Chicago Pay to State Bank of Chicago, Ill., or Order Columbia Bank, New York W. S. Griffith, Cashier.

Form 134 10M. 5-04.

Accounts Payable.

Ys April 1904
The Chicago & Alton Railway Company. 59721
12-03 To Schwarzschild and Sulzberger Co. Dr.
Address Union Stock Yards,
Chicago, Ills
Pay same direct. 1000
6—R

1904 For the following, as per bill rendered, filed in the Auditor's office, viz.:

For refund of Terminal Charges assessed at Kansas City Month of December 1903 281 Cars @ $1.00 per car $281.00

This voucher can be used as a check payable at the Illinois Trust & Savings Bank, Chicago, Sign Original and Duplicate (if any). Deposit at Once. Make no alterations or erasures. Do Not Detach Duplicates.

Paid
May 20 1904
Asst. Treasurer
Chicago & Alton Ry. Co.

Correct:
6753

Correct:
FRED A. WANN.

Approved:
J. N. FAITHORN,
Vice President.
CH. H. DAVIS, *Auditor.*

55 Received May 18 1904, of the Chicago & Alton Railway Company, Two Hundred and Eighty One Dollars. In full for the above account.
$281.00

SCHWARZSCHILD & SULBERGER COMPANY,
(S'gn) GULSBERG, *Cashier.*

NOTE.—The above receipt must be dated and signed by the party in whose favor this voucher is made, or when signed by another party, the authority for so doing must, in all cases, accompany it.

(On the back:) Treasurer's No. 11179 May 11 1904 The Illinois Trust & Savings Bank, Chicago, Ill. will pay this voucher when original & duplicate (if any) are properly signed. H. E. R. Wood, Asst. Treas. Pay to Columbia Bank, Or Order, Sgn. Gulsberg. Schwarzschild & Sulzberger Co. F. Sulzberger, Treas. Paid Through the Chicago Clearing 18 House May 20 1904. All prior endorsements guaranteed. State Bank of Chicago Pay to State Bank of Chicago Chicago, Ill. Or Order, Columbia Bank, New York. W. S. Griffith, Cashier.

(Here follows diagram marked p. 56.)

BLUEPRINT

TOO

LARGE

FOR

FILMING

57 And thereupon the Government introduced evidence in support of the ninth and tenth counts of the indictment.

Said evidence is not inserted herein for the reason that the court subsequently instructed the jury to find the defendants, and each of them, not guilty as to the said ninth and tenth counts.

And thereupon the Government rested its case.

Mr. SHAW: On behalf of each of the defendants in this case, I now move to exclude all of the evidence in this case, and in connection therewith I request on behalf of each of the defendants that the court instruct the jury to find each of the defendants, jointly and severally, not guilty with respect to each count of the indictment; and I now make the same motion on behalf of each defendant with respect to the indictment taken as a whole.

Thereupon the court heard arguments from the respective counsel in the case on the motion for the court to exclude the evidence and instruct the jury to find each of the defendants not guilty upon each count of the indictment.

Several adjournments were thereupon had by agreement of the parties and the court met pursuant to adjournment on July 6th, 1906 at 9:30 A. M.

The COURT: I have no doubt whatever as to the ninth and tenth counts. The indictment does not charge an offense and as to these two counts the defendants are entitled to a verdict of not guilty.

(Thereupon the court addressed the District Attorney.)

What is your opinion as to how many offenses are charged in the first eight counts?

Mr. MORRISON: The first four counts charge one offense in four different ways; the remaining four counts charge one offense in four different ways, and if the defendants are found guilty, all three of them should be sentenced for one offense on account of the first four counts in the indictment, and all of them should be sentenced for one offense on account of the remaining four counts. This is the understanding that counsel on both sides of the case have had as to the legal effect of these counts and Mr. Shaw in his opening so stated to the court.

The COURT: It can be understood and can be disposed of on that theory, that is, that the first four counts charge one offense in four different ways and the next four counts charge one offense in four different ways.

58 And thereupon the court delivered the following decision and opinion on defendants' motions to take the case from the jury.

The COURT: I made a memorandum on this subject as follows: The Government having proved its case, the defendants move for an order directing the jury to return a verdict of not guilty, and the material facts are as follows: The Chicago & Alton Railway Company is an interstate common carrier, operating a line of railroad in Kansas City to points east. The Belt Company is an interstate carrier between Kansas City and Missouri. The Schwarzschild & Sulz-

berger Company is a corporation engaged in the packing business at Kansas City. The track of the Alton Company connects with the Belt Road at Kansas City, Missouri, and the Belt Track connects with the track of the Schwarzschild & Sulzberger Company made and maintained by that company on its own property at Kansas City, Kansas, occupied also by its packing plant.

It appears that prior to 1901, in the published tariff of the Belt line on loaded cars hauled by it from the Schwarzschild & Sulzberger plant over the Packing Company's track and its own rails to the Alton connection was $4 per car, and that this charge of the Belt line was absorbed by the Alton Company in its published tariffs, covering shipments from Kansas City to eastern points. That is to say, the Alton Company collected from the packing company the full tariff and paid to the Belt Company $4 on each car coming from the Schwarzschild & Sulzberger plant.

It also appears that the Belt Company paid to the packing company one dollar for each loaded car so moved. This practice was known to the Alton Company and continued until January, 1904, when, for some reason, but at the request—when for some reason, which doesn't appear, but at the request of Schwarzschild & Sulzberger the arrangement was changed so that the Alton Company made payments direct to the Packing Company instead of through the medium of the Belt Company. The Belt line filed new schedules showing its rates for moving the packing company's traffic to be $3 per car, which charge the Alton Road absorbed in its tariffs collected from Schwarzschild & Sulzberger—which amount the Alton absorbed in its tariff collected from Schwarzschild & Sulzberger, and paid over to the Belt.

59 The indictment charges that the payment of this money to the packing company is a rebate. The defendants contend that it is a legitimate payment to Schwarzschild & Sulzberger for the use of that company's track connecting the shipping docks of the packing plant with the Belt line. The Interstate Commerce law requires the carrier to publish schedules of its rates and charges for the transportation of passengers and property. The law also provides that the schedule shall state the terminal charges and any other rule or regulation which in any wise changes, affects or determines the aggregate of such rate and charges, the Elkins law forbids the carrier to offer or give any rebate in respect to the transportation of any property in interstate commerce whereby such property shall, by any device whatever, be transported at a less rate than that named in the published tariffs.

It is argued in behalf of the defendants that if any section of the law is violated, it is that provision which requires the carrier's schedules to state the terminal charges and rules which charge the aggregate rate.

I am unable to see the force of this contention. The return by the defendant carrier to the packing company of a part of the money paid by the shipper to the carrier for the transportation of the shipper's property is not a charge or rule or regulation within the

meaning of that provision of the law requiring such last mentioned items to be exhibited in the carrier's published schedule.

The question here is whether or not the payment so made is a device whereby the packing company's property is transported at less than the Alton's published rate, which, as seen above, includes the service on the Belt tracks. It would seem that to state that question is to answer it. By the word "Rate" is not meant merely the figure printed on the schedule filed with the Interstate Commerce Commission. The real rate is the net cost to the shipper of the transportation of his property, the net amount the carrier receives from the shipper and retains. This net amount in the pending case is one dollar per car less than the carrier's published schedule representing the rate to be paid.

Viewing the transaction from the standpoint most favorable to the defendant, it amounts to the railway company assuming the cost of getting the shipper's property to the carrier's rails for transportation, a substantial consideration not mentioned in or contemplated by the published schedules. With equal propriety, its schedules being silent on the subject, a carrier might pay the consignor's or consignee's bills for the cartage of property between their warehouse and the railway depot.

The object of the statute relating to interstate commerce is to secure the transportation of persons and property by carriers for a reasonable compensation. They recognize the obvious fact that no rate can be reasonable that is higher than somebody else has to pay. Therefore, they require the carrier to establish and adhere to an absolute standard of uniformity. The requirement of publication is *in* imposed in order that a person having freight to ship may ascertain exactly, by inspection of the schedule, what will be the cost to him of such transportation, and not only so, but under the law, he has a right likewise to know by an inspection of the same schedule exactly what it will cost his competitor for such transportation.

It is my opinion when the Alton Company published a specific rate for transportation of packing house products from Kansas City to Eastern points and collected that rate from the S. & S. Company, the Alton Company gave the packing company a rebate, by means of which the packing company's product was transported at a less rate than that named in the published tariff.

The defendants' motion will therefore be overruled as to the first eight counts.

To which action of the court the defendants, and each of them, then and there duly excepted.

As an indictment, the 9th and 10th counts are fatally defective, in my judgment, and the motion of the defendant for a peremptory instruction on those two counts is sustained.

Mr. SHAW: May it please the court, as to those first eight counts, we propose to recall Mr. Fitzgerald and as a part of the defense put him and other witnesses on the stand for the purpose of proving the *that* sum per car paid the S. & S. Company was a reasonable sum for the facilities and services furnished by them; that in fact it was less than a reasonable charge would have been.

The COURT: The evidence is ruled out. You may except and make a record.

Mr. SHAW: We have witnesses here to prove that the charge was a reasonable charge, was even less——

The COURT: Let the record show that the defendants have witnesses present in court who are competent to testify as to the reasonableness of the service involved in the moving of the cars
61 containing the Schwarzschild & Sulzberger's product, shipping it from Schwarzschild & Sulzberger's plant to the connection of Schwarzschild & Sulzberger's tracks with the Belt line. How many witnesses have you?

Mr. SHAW: Six.

The COURT (Continuing): That six of such witnesses are tendered and placed upon the stand and are questioned as to the subject, and the Government objects to the testimony, and that the court sustains the objection, and that you except, and that the defendants offer by each of said witnesses to prove that one dollar per car referred to in eight counts of the indictment herein is less than the fair and reasonable value of the trackage furnished by the Schwarzschild & Sulzberger Company, and that the sum of one dollar per car referred to in the first eight counts of the indictment was less than reasonable compensation for the use of said tracks furnished, owned, constructed and maintained by the said Schwarzschild & Sulzberger Company, and that the objection to all and every part of said evidence is made by the District Attorney, and that the objection is sustained and you except. Of course this follows from what I stated on your motion for a peremptory instruction.

Mr. SHAW: I would like to phrase that a little different.

The COURT: You may at your leisure fix the record just as you want to.

Thereupon the defendants, and each of them, tendered the six several witnesses and offered to prove by each and all of them that the sum of one dollar per car paid the Schwarzschild & Sulzberger Company for each outgoing loaded car, as mentioned in the stipulation herein, was a reasonable charge as to amount.

To the introduction of which evidence the attorney for the Government objected on the ground of irrelevancy and immateriality; which objection was sustained by the court.

To which ruling of the court, the defendants, and each of them, by their counsel, then and there duly excepted.

And the defendants here rested their case.

The COURT (Addressing counsel for defendants): You have my views on the matters that are involved here. You have saved any exception that could possibly arise from a formal re-statement of this situation to this jury.

Whereupon the court charged and instructed the jury as follows:

62 The COURT: Gentlemen of the jury, you have heard what the court has said as to the court's views on the law governing the matter which has been on trial before you. You have also heard the facts. I now say to you that it is your duty to accept the court's

views on the law as the law of this case. Bearing that in mind, if you find from the evidence that when the Alton, the defendant, the Chicago & Alton Railway Company paid to the Schwarzchild & Sulzberger Company one dollar on each car of that company's product, coming from that company's plant over the Belt tracks to the Alton Road amounted to the defendant, Chicago & Alton Railway Company, thereby giving to the Schwarzschild & Sulzberger a rebate or commission or discrimination in respect to the transportation of property of the Schwarzschild & Sulzberger Company in interstate or foreign commerce, and I charge you as a fact that the commerce was interstate, and that by means thereof the Schwarzschild & Sulzberger Company's property was transported at a rate less than the published tariff of the Chicago & Alton Railway Company, you will find the defendant, the Chicago & Alton Railway Company guilty, as charged in the first eight counts of this indictment, and you will apply what I have said respecting your consideration of this case as to the Chicago & Alton Railway Company to the defendants Faithorn and Wann, vice-president and general freight agent, respectively, of the Chicago & Alton Railway Company. If you don't believe from the evidence that this payment does amount to a rebate, concession or discrimination, whereby the property of this packing company was transported at less than the published tariff rate, as indicated in my instruction, you will find the defendants, and each of them not guilty of the charges, and all of them, under the first eight counts of this indictment. To find the defendants guilty, you must believe that the facts show that this payment of one dollar by the railway company and its officers to the packing company amounted to a rebate, concession, or discrimination to the packing company in respect to the transportation of the property of that packing company, and that thereby the packing company had its property transported at a less sum than that named in the tariff rate, beyond a reasonable doubt. The facts admitted in the case are that the Alton Company published its schedules, showing its through rate from Kansas City to points east; that these schedules cover and include the switching charges of the Kansas City Belt Line, which line connected the Alton
63 track with the private track of Schwarzschild & Sulzberger; that having collected from Schwarzschild & Sulzberger this through rate, the defendants gave back to Schwarzschild & Sulzberger one dollar on each car so moved. The position of the defendants is that that one dollar was paid for the use of Schwarzschild & Sulzberger's private track, laid on their own ground, connecting their own plant, their own shipping docks with the Belt track. The tariff schedules were silent as to this arrangement. Whether a violation of the law exists because of the failure of the schedules to mention this one dollar payment by the defendants to Schwarzschild & Sulzberger, is not before you for determination. The sole question for you to determine is whether this payment, under the circumstances, amounted to a rebate and concession, as indicated in my instruction.

If you find the defendants guilty, the form of your verdict will be, "We, the jury find the defendants guilty as charged in the first eight counts of the indictment," and if you find the defendants not guilty,

the form of your verdict will be, "We, the jury, find the defendants not guilty."

Gentlemen of the jury, I now direct you to return a verdict finding the defendants not guilty under the last two counts. Enter a verdict of the jury finding the defendants not guilty on the 9th and 10th counts.

Whereupon the jury returned a verdict against said defendants, and each of them, finding the said defendants, and each of them, guilty as charged in the first eight counts of said indictment.

Whereupon the defendants, and each of them, made and entered their motion for a new trial, and set forth and argued the following grounds for a new trial, to-wit:

1. The said indictment, and each of the counts thereof fails to charge against any or either of said defendants any offense under the laws of the United States.

2. The court erred in refusing to admit on the trial of said cause proper and competent evidence offered on the part of the said defendants, and each of them, to-wit:

Evidence proving that the amount of one dollar per car referred to in each of the first eight counts of the indictment was a reasonable charge and less than the fair and reasonable value of the use of the trackage furnished by the Schwarzschild & Sulzberger Company, and that the sum of one dollar per car referred to in said first eight counts is less than reasonable compensation for the use of said tracks
64 owned, constructed, furnished and maintained by said Schwarzschild & Sulzberger Company.

3. The court erred in improperly instructing the jury in said cause in the following particulars, to-wit:

Gentlemen of the jury, you have heard what the court has said as to the court's views on the law governing the matter which has been on trial before you. You have also heard the facts. I now say to you that it is your duty to accept the court's views on the law as the law of this case. Bearing this in mind, if you find from the evidence that when the Alton, the defendant, the Chicago & Alton Railway Company, paid to the Schwarzschild & Sulzberger Company one dollar on each car of that company's product, coming from that company's plant over the Belt tracks to the Alton road amounted to the defendant, Chicago & Alton Railway Company, thereby giving to Schwarzschild & Sulzberger Company a rebate or commission or discrimination in respect to the transportation of property of the Schwarzschild & Sulzberger Company in interstate or foreign commerce, and I charge you as a fact that the commerce was interstate, and that by means thereof the Schwarzschild & Sulzberger Company's property was transported at a rate less than the published tariff of the Chicago & Alton Railway Company, you will find the defendant, the Chicago & Alton Railway Company, guilty, as charged in the first eight counts of this indictment, and you will apply what I have said respecting your consideration of this case as to the Chicago & Alton Railway Company to the defendants Faithorn and Wann, vice-president and general freight agent, respectively, of the Chicago & Alton Railway Company. If you don't

believe from the evidence that this payment does amount to a rebate, concession or discrimination, whereby the property of this packing company was transported at less than the published tariff rate, as indicated by my instruction, you will find that the defendants, and each of them, not guilty of the charges, and all of them, under the first eight counts of this indictment. To find the defendants guilty, you must believe that the facts show that this payment of one dollar by the railway company and its officers to the packing company amounted to a rebate, concession, or discrimination to the packing company in respect to the transportation of property of that packing company, and that thereby the packing company had its property transported at a less sum than that named in the tariff rate,
65 beyond a reasonable doubt. The facts admitted in the case are that the Alton Company published its schedules, showing its through rate from Kansas City to points East; that these schedules cover and include the switching charges of the Kansas City Belt Line, which line connected the Alton track with the private track of the Schwarzschild & Sulzberger; that having collected from Schwarzschild & Sulzberger this through rate, the defendant gave back to Schwarzschild & Sulzberger one dollar on each car so moved. The position of the defendants is that this one dollar was paid for the use of Schwarzschild & Sulzberger's private track, laid on their own ground, connecting their own plant, their own shipping docks with the Belt track. The tariff schedules were silent as to this arrangement. Whether a violation of the law exists because of the failure of the schedules to mention this one dollar payment by the defendants to Schwarzschild & Sulzberger is not before you for determination. The sole question for you to determine is whether this payment, under the circumstances amounted to a rebate and concession, as indicated in my instruction. The jury have the court's opinion, and if you find the defendants guilty, the form of your verdict will be, "We, the jury, find the defendants guilty as charged in the first eight counts of the indictment," and if you find the defendants not guilty the form of your verdict will be, "We, the jury, find the defendants not guilty."

4. The court erred in improperly refusing to instruct the jury as requested by the defendants, and each of them, in the following particulars, to-wit: The court refused to instruct the jury as follows:—

"The court instructs the jury to find the defendants, and each of them, not guilty as to each and every count of said indictment."

5. The verdict of the jury is contrary to the law.

6. The verdict of the jury is contrary to the evidence in the case.

And after hearing argument of counsel in support of motion for a new trial, the court delivered the following opinion in said cause.

The COURT: In this matter, which is the prosecution of the Chicago & Alton Railway Company and two of its officers, Faithorn, Vice-President, and Wann, General Freight Agent—the indictment is in ten counts. The first four counts charge an offence against the

Elkins Law by the payment of a certain sum of money in the
66 month of May, 1905 to Schwarzschild & Sulzberger, a packing company of Kansas City, Kansas. The next four counts, that is to say, the fifth, sixth, seventh and eighth counts, charge another offence against this same law by this railway Company and these two officers, in that the railway company, by its two officers, paid to the same packing company, in the month of May, another sum of money, both payments being appropriately charged to these respective accounts to have been in respect of the transportation of property by the defendant railway company in interstate commerce, and both of which payments are charged in these several counts with having been rebates, and with having affected the transportation of property of the corporation receiving these payments, at a rate less than that published in the schedule filed with the Interstate Commerce Commission, as the law requires. The ninth and tenth counts of this indictment charge that the defendant railway company, by its two officers, had paid back to the Schwarzschild & Sulzberger Company approximately $3500 of money, which was the aggregate of a large number of passenger fares, prior to the date of the payment by said Schwarzschild & Sulzberger to the Chicago & Alton Railway Company for the transportation of the packing company's agents and employés over the line of the railway company.

For reasons, which the court has heretofore indicated at some length, these two counts, the ninth and tenth counts, were fatally defective. They charged no offence, and as to those counts, the jury, under my peremptory direction, returned a verdict in favor of the defendants of not guilty.

The two offences charged in the first eight counts are identical, and in my judgment, and to my view, are perfectly and clearly violations of the law.

The facts respecting these two offences are, in substance: The Chicago & Alton Railway Company is a common carrier from Kansas City, Missouri, to points east; The Schwarzschild & Sulzberger Company is a packing Company, with a plant located at Kansas City, Kansas. On its plant, on the land occupied by its plant, are switching tracks, which it laid down, and which it maintained. These switching tracks of the packing company are connected with the Chicago & Alton Railway Company by means of the Kansas City Belt Railway line, which is an interstate carrier, operating between Kansas and Missouri, doing a switching service be-
tween Kansas City, Kansas, and Kansas City, Missouri. The
67 Chicago & Alton Railway Company is required by law to publish its tariff covering packinghouse products from Kansas City to eastern points. Under this published tariff, the Alton rate covered not merely the service over the Alton rails, but extended to and included and absorbed the service over the Belt rails, so that the published rate of the Alton Company covering packinghouse products meant that that rate, so published, was the amount of freight which the Alton road would exact for the transportation of packinghouse products from points on the Kansas City Belt to desti-

nation over the Alton rails. Schwarzschild & Sulzberger had a vast amount of traffic handled by the Alton road. The Alton road collected from Schwarzschild & Sulzberger this published tariff, and then the Alton road gave back to Schwarzschild & Sulzberger on each car so handled, the sum of one dollar, on an alleged account of trackage charges against the Alton road by Schwarzschild & Sulzberger, which trackage charge was imposed for the act of the Alton engine going in over Schwarzschild & Sulzberger's private switch to the packing company's shipping dock, and there connecting the engine with Schwarzschild & Sulzberger's car, and hauling it out over this private track to the Belt.

It has seemed to me through this trial that instead of paying Schwarzschild & Sulzberger for rendering that service, that Schwarzschild & Sulzberger, in justice, might pay the charge by the Alton road to it for the service, because it was service that was given and rendered by the Alton road before the property of the shipper was received on the Belt tracks, which Belt tracks were the point of origin under the Alton published schedules covered by the Alton's published rates. In other words, in this respect, I saw no difference whatever between the Alton road paying Schwarzschild & Sulzberger this money than I would be able to see if the Alton Road had paid Schwarzschild & Sulzberger—if the Alton road had been to the expense of hauling Schwarzschild & Sulzberger's packinghouse products in wagons from Schwarzschild & Sulzberger's plant to the railroad company's track. I see no difference.

Now these are the facts. A jury has rendered a verdict of guilty under the instructions of the court, from which verdict, as I have said before, I have never been able to see any escape. Counsel talks about this being open and notorious. With the exception of the argumentative assertion of counsel that this thing was open
68 and notorious, there is not before me a single fact or circumstance indicating that it was not done in a most secret manner.

Mr. SHAW: If the court will give us a chance to get these——

The COURT: I have given you ample chance. If the shipping public of Kansas City,—if the railroad public of Kansas City knew about this practice—in other words, if it was notorious—if it was a matter of common knowledge in Kansas City among shippers and transportation men, whose business in life compels them to keep in touch with such transactions, there would be no difficulty whatever, I assume in the four days which elapsed from the time on Friday morning when I adjourned the further hearing of this cause until this morning to bring witnesses to these facts here, because under the statutes of the United States, either party has the right to compulsory process. The payments which were made to Schwarzschild & Sulzberger for the service rendered in December 1904, were made in 1905, five months afterwards. Now, that circumstance is not in harmony with the usual and ordinary methods which railroad companies adopt in the payment of their concededly just obligations. And the same way with the check which went in May to cover the

January payment of 1905. These two checks approximate, one of them about $250, and one of them nearly $300, showing the amount of money which was paid back by the railway company to this packing company in the aggregate. It was no small amount, it was a substantial sum.

So I say there is not a thing before me, except the argument of counsel which even remotely tends to indicate that this arrangement was regarded by the railroad company or the packing company as an open arrangement.

Prior to 1887, there was not any act of Congress covering these matters. The rules of the common law obtained, and at common law the only obligation the carrier is under in respect of the transportation of property was to render the service for what the law called a reasonable compensation. Judges of the courts even disagreed as to whether or not common carriers were obliged to give to all shippers of property the same rate at common law, although considering the nature of the service, and the fact that in rendering the service the common carrier exercised public franchise powers granted by the state, it would seem that uniform treatment was absolutely essential to reasonableness.

In 1887, this law was passed, and it required uniformity; It required a publication of rates. That law was ineffective.
69 From 1887, to 1903, the complaint grew about it that the law largely failed to accomplish the purpose of its enactment. Two or three years before 1903, the question of transportation rates, the question of absence of uniformity in transportation rates, engaged the attention of men whose business brought them in touch with the transportation question, shippers of property, and there was a very industrious agitation of this whole question. The result of that agitation was the Elkins' law in February, 1903. That law did away with the imprisonment feature of the old law and substituted a fine, and it also provided that in addition to the fine to be imposed upon the railway employé or officer who acted for the railroad company in giving to some shipper something in the way of a financial concession that resulted in getting that shipper's property, the carrier also would be guilty of a misdemeanor, and punishable to the same extent as the law authorized the officer or employé himself to be punished. That law was passed in 1903. I can't forget that the shipping world and the railroad world gave close and diligent attention to that law, and that any man interested in the general situation would have no difficulty in ascertaining whether or not a law had been passed preventing practices of this kind. This offence occurred nearly one year after that law was passed, so I will say that there are not many facts or circumstances in this case that appeal to me in support of counsel's argument that it is not a case for substantial punishment. The Elkins law seems to have gone on the theory that the way to put a stop to this practice is to fix it so it doesn't pay. As I stated before, there are only two offences covered by the first eight counts.

On each one of these two offences, it is the sentence of the court

that the defendant, the Chicago & Alton Railway Company pay a fine of $20,000, and that on each one of these two offences, for each one of these two offences, the defendant, Faithorn, and the defendant, Wann, each pay a fine of $5,000.

Mr. SHAW: To make the record straight, the court will overrule the motion for a new trial, and I will take an exception.

The COURT: Yes.

Mr. HANCHETT: The two counts as I understand it, are the third and seventh counts.

The COURT: They are the fifth and eighth counts, as I un-
70 derstand it. I don't know, the record may be arranged. There are two offences only here.

Mr. HANCHETT: Yes.

The COURT: Four counts charging each offence in four different ways.

Mr. HANCHETT: That is right.

The court thereupon overruled the motion of said defendants, and each of them, for a new trial in said cause; to which action of the court, the said defendants, and each of them, then and there duly excepted.

And thereupon the said defendants, and each of them, made in said cause, their motion in arrest of judgment.

And thereupon the court overruled the said motions of the said defendants, and each of them. To which action of the court in so overruling the said motions, the said defendants, and each of them, then and there duly excepted.

And thereupon, on the 11th day of July, 1906, the court passed sentence and entered judgment against the said defendants upon the verdict of the jury, as follows:

That the defendant, the Chicago & Alton Railway Company, forfeit and pay to the United States a fine in the sum of $40,000, besides the costs herein; that the defendant, Fred. A. Wann, forfeit and pay to the United States a fine in the sum of $10,000, besides the costs herein, and that John N. Faithorn forfeit and pay to the United States a fine in the sum of $10,000, besides the costs herein.

To which action and ruling of the court in so passing sentence and entering judgment against the said defendants, the said defendants, and each of them then and there duly excepted.

Whereupon the said defendants, and each of them, by their attorneys, entered their motion for a writ of error to the United States Circuit Court of Appeals for the Seventh Circuit, and the court granted ninety days' time within which to present and file a bill of exceptions and fixed the bonds of the defendants, as follows:

Chicago & Alton Railway Company $40,000. Fred A. Wann, $10,000. John N. Faithorn $10,000.

And forasmuch as the matters hereinabove set forth do not fully appear of record and to the end that the said matters may be made and become of record, the defendants tender this their bill of excep-
tions as the joint and several bill of exceptions of the said
71 defendants, and of each of them, and pray that the same may be signed and sealed by the Judge of this Court pursuant to

the statute in such case made and provided; and it is done accordingly, this first day of September, A. D. 1906.

KENESAW M. LANDIS. [SEAL.]
Judge of the District Court of the United States for the Northern District of Illinois, Northern Division.

Aug. 31—1906.

O. K.
C. B. MORRISON,
U. S. Atty.

And afterwards, towit, on the 16th day of July, A. D. 1906, there was filed in the Clerk's Office of said Court in the above entitled cause, a Petition for Writ of Error, the same being in the words and figures following, towit:

In the District Court of the United States of America for the Northern District of Illinois, Northern Division.

No. 3627.

UNITED STATES OF AMERICA
vs.
FRED A. WANN, JOHN N. FAITHORN, and THE CHICAGO & ALTON RAILWAY COMPANY.

Indictment on Act of Feb. 4, 1887, as Amended by Act of Feb. 14, 1903 (Interstate Commerce Law).

Petition for Writ of Error.

Comes now The Chicago & Alton Railway Company, a corporation, one of the defendants in the above entitled cause, and respectfully shows that a verdict of guilty was rendered against it by the jury in the above entitled cause and that judgment and sentence was pronounced against it on the 11th day of July, A. D. 1906, upon said verdict by which said verdict, judgment and sentence your petitioner was convicted of a violation of a certain statute of the United States of Amreica, to-wit, of a violation of the Act of Con-
72 gress of the United States of America of February 4th, 1887, as amended by the Act of Congress of the United States of America of February 14th, 1903 (commonly known as the Interstate Commerce Laws), and was adjudged and sentenced to pay to the United States of America two fines aggregating the sum of forty thousand dollars ($40,000.00). And your petitioner respectfully shows that in the said judgment and in the proceedings had prior thereto in the above entitled cause certain errors were committed to the prejudice of your petitioner; all of which will more in detail appear in the assignment of errors which is filed together with this petition.

Wherefore, said The Chicago & Alton Railway Company prays

that a writ of error may issue in this behalf to the said District Court, returnable to the next term of the United Staes Circuit Court of Appeals for the Seventh Circuit for correcting the errors complained of; that said writ of error may be made a supersedeas and that execution on said judgment and further proceedings in said District Court may be suspended and stayed; and that all further and necessary orders and process may be made to the end that the errors complained of may be corrected by said United States Circuit Court of Appeals for the Seventh Circuit, and that said judgment and sentence may be reversed, set aside and held for naught.

And said petitioner The Chicago & Alton Railway Company shows that it was jointly indicted and tried in the above entitled cause in said District Court with said Fred A. Wann and John N. Faithorn, and that a joint verdict of guilty was returned by the jury in said cause against your petitioner and said Fred A. Wann and John N. Faithorn in the above entitled cause, and that judgment and sentence was entered against said Fred A. Wann, whereby the said Fred A. Wann was adjudged and sentenced by said District Court to pay to the United States of America two fines aggregating ten thousand dollars ($10,000.00), and a judgment and sentence was rendered against said John N. Faithorn in said cause whereby said John N. Faithorn was adjudged and sentenced by said District Court to pay to the United States of America two fines aggregating ten thousand dollars ($10,000.00); that said District Court has entered an order in said cause permitting said three defendants to file in said cause within ninety days from the said 11th day of July, A. D. 1906, a single bill of exceptions, which said bill of exceptions shall
73 be taken and held to be a bill of exceptions in said cause of each of said defendants severally; that the said assignment of errors filed in said District Court in the above entitled cause on behalf of said petitioner is substantially a duplicate of a certain assignment of errors which has been filed in said cause by the said Fred A. Wann and also is a substantial duplicate of a certain assignment of errors which has been filed in said cause by said John N. Faithorn, and that both the said Fred A. Wann and said John N. Faithorn have filed in said cause petitions for writs of error similar to this petition, praying that said judgments and sentences of the said District Court may be reversed and set aside and held for naught.

Wherefore, your petitioner prays an order directing the Clerk of said District Court to make a return of said three several writs of error to be granted in this cause on behalf of your petitioner and of said Fred A. Wann and of said John N. Faithorn by transmitting to said United States Circuit Court of Appeals a single and true copy of the record in the above entitled cause, of said bill of exceptions, and of said three several assignments of error, and of said three several writs of error, and of the proceedings in said court in said cause No. 3627, necessary to the hearing in said United States Circuit Court of Appeals of said three several writs of error.

WINSTON, PAYNE & STRAWN,
FREDERICK S. WINSTON, &
RALPH M. SHAW,
Attorneys for said The Chicago & Alton Railway Company.

Endorsed: No. 3627. In the District Court of the United States of America for the Northern District of Illinois, Northern Division United States of America *vs.* Fred A. Wann, John N. Faithorn and The Chicago & Alton Railway Company, Petition for Writ of Error of Defendant The Chicago & Alton Railway Company, Filed July 16, 1906, T. C. MacMillan, Clerk. Winston, Payne & Strawn, Attorneys at Law, First National Bank Building, Chicago.

And afterwards, to wit, on the 16th day of July, A. D. 1906, there was filed in the Clerk's Office of said Court, in the above entitled cause, an Assignment of Errors, same being in the words and figures following, to wit:

74 In the District Court of the United States of America for the Northern District of Illinois, Northern Division.

No. 3627.

UNITED STATES OF AMERICA
vs.
FRED A. WANN, JOHN S. FAITHORN, and THE CHICAGO & ALTON RAILWAY COMPANY.

Indictment on Act of Feb. 4, 1887, as Amended by Act of Feb. 11, 1903 (Interstate Commerce Law).

Assignment of Errors.

And now comes the defendant, The Chicago & Alton Railway Company, a corporation, by Winston, Payne & Strawn, Frederick S. Winston and Ralph M. Shaw, its attorneys, and in connection with its petition for a writ of error herein, says that in the records and proceedings and during the trial of the above entitled cause in the said District Court error has intervened to its prejudice, and this defendant here assigns the following errors, to-wit:

1. Said indictment and each of the counts thereof fails to charge against this defendant any offense under the laws of the United States.

2. The Court erred in refusing to admit on the trial of said cause proper and competent evidence offered on the part of this defendant, to-wit:

Evidence proving that the amount of one dollar per car referred to in each of the first eight counts of the indictment was less than the fair and reasonable value of the trackage furnished by the Schwarzschild & Sulzberger Company, and that the sum of one dollar per car referred to in said first eight counts is less than reasonable compensation for the use of said tracks owned, constructed, furnished and maintained by said Schwarzschild & Sulzberger Company.

3. The Court erred in improperly instructing the jury in said cause in the following particulars, to-wit:

Gentlemen of the jury, you have heard what the court has said

as to the court's views on the law governing the matter which
75 has been on trial before you. You have also heard the facts.

I now say to you that it is your duty to accept the court's views on the law as the law of this case. Bearing this in mind, if you find from the evidence that when the Alton, the defendant, the Chicago & Alton Railway Company, paid to the Schwarzschild & Sulzberger Company one dollar on each car of that company's product, coming from that company's plant over the Belt tracks to the Alton Road amounted to the defendant, Chicago & Alton Railway Company, thereby giving to Schwarzschild & Sulzberger Company a rebate or commission or discrimination in respect to the transportation of property of the Schwarzschild & Sulzberger Company in interstate or foreign commerce, and I charge you as a fact that the commerce was interstate, and that by means thereof the Schwarzschild & Sulzberger Company's property was transported at a rate less than the published tariff of the Chicago & Alton Railway Company, you will find the defendant, the Chicago & Alton Railway Company, guilty, as charged in the first eight counts of this indictment, and you will apply what I have said respecting your consideration of this case as to the Chicago & Alton Railway Company to the defendants Faithorn and Wann, vice-president and general freight agent, respectively, of the Chicago & Alton Railway Company. If you don't believe from the evidence that this payment does amount to a rebate, concession or discrimination, whereby the property of this packing company was transported at less than the published tariff rate, as indicated by my instruction, you will find that the defendants, and each of them, not guilty of the charges, and all of them, under the first eight counts of this indictment. To find the defendant guilty, you must believe that the facts show that this payment of one dollar by the railway company and its officers to the packing company amounted to a rebate, concession, or discrimination to the packing company in respect to the transportation of the property of that packing company, and that thereby the packing company had its property transported at a less sum than that named in the tariff rate, beyond a reasonable doubt. The facts admitted in the case are that the Alton Company published its schedules, showing its through rate from Kansas City to Points east; that these schedules cover and include the switching charges of the Kansas City Belt Line,
76 which line connected the Alton track with the private track of the Schwarzschild & Sulzberger — ; that having collected from Schwarzschild & Sulzberger this through rate, the defendant gave back to Schwarzschild & Sulzberger one dollar on each car so moved. The position of the defendants is that this one dollar was paid for the use of Schwarzschild & Sulzberger's private track, laid on their own ground, connecting their own plant, their own shipping docks with the Belt track. The tariff schedules were silent as to this arrangement. Whether a violation of the law exists because of the failure of the schedules to mention this one dollar payment by the defendants to Schwarzschild & Sulzberger is not before you for determination. The sole question for you to determine is whether this payment, under the circumstances, amounted to a rebate and con-

cession, as indicated in my instruction. I instructed the jury, and I instructed them to find a verdict of guilty, that is what it would be tantamount to. The jury have the court's opinion, and if you find the defendants guilty, the form of your verdict will be, "We, the jury, find the defendants guilty as charged in the first eight counts of the indictment," and if you find the defendants not guilty the form of your verdict will be, "We the jury, find the defendants not guilty."

4. The Court erred in improperly refusing to instruct the jury as requested by this defendant in the following particulars, to-wit:

The court instructs the jury to find the defendants and each of them not guilty as to each and every count of said indictment.

5. The verdict of the jury is contrary to the law.

6. The verdict of the jury is contrary to the evidence in the case.

7. The Court erred in overruling this defendant's motion for a new trial in said cause.

8. The Court erred in denying the motion of this defendant in arrest of judgment in said cause.

9. The Court erred in entering a judgment and sentence in said cause.

10. The judgment in said cause is contrary to the Statutes of the United States.

11. The judgment and sentence of the Court is unreasonable and oppressive.

12. The fine imposed by said Court against this defendant
77 is in excess of the maximum fine which may be imposed upon this defendant under said indictment under the Statutes of the United States.

13. The fine imposed upon this defendant and the judgment of said Court entered thereon is contrary to law.

Wherefore, said Chicago & Alton Railway Company, by reason of the errors aforesaid, prays that said judgment and sentence against it the said Chicago & Alton Railway Company may be reversed, set aside and held for naught.

WINSTON, PAYNE & STRAWN,
FREDERICK S. WINSTON,
RALPH M. SHAW,
Attorneys for Defendant The Chicago & Alton Railway Company.

Endorsed: No. 3627 In the District Court of the United States of America for the Northern District of Illinois, Northern Division. United States of America *vs.* Fred A. Wann, John N. Faithorn and The Chicago & Alton Railway Company. Assignment of Errors of Defendant The Chicago & Alton Railway Company Filed July 16, 1906. T. C. MacMillan, Clerk. Winston, Payne & Strawn, Attorneys at Law, First National Bank Building, Chicago.

MONDAY, *July 16th*, 1906.

Before Hon. Peter S. Grosscup, Presiding Judge.

THE CHICAGO & ALTON RAILWAY COMPANY

vs.

UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Northern Division.

Let a writ of error issue from the United States Circuit Court of Appeals for the Seventh Circuit to the United States District Court of the Northern Division of the Northern District of Illinois as prayed for in said petition for writ of error of The Chicago & Alton Railway Company, a corporation, and let said writ of error operate as a supersedeas staying the execution of the judgment and
78 sentence pronounced in said District Court against said The Chicago & Alton Railway Company during the pendency of said writ of error and until the further order of said Circuit Court of Appeals, upon the filing with the Clerk of said United States Circuit Court of Appeals of a good and sufficient bond in the sum of forty thousand dollars ($40,000.00), conditioned as required by law, with sureties to be approved by the Clerk of said Court.

And the Clerk of said District Court is hereby directed to make return of the three several writs of error sued out and allowed in said cause in behalf of said Fred. A. Wann and of said John N. Faithorn and of said The Chicago & Alton Railway Company by transmitting to said Clerk of the United States Circuit Court of Appeals a single and true copy of the record and the proceedings in the above entitled cause and of the bill of exceptions in said cause and of the three several assignments of error of said Fred A. Wann, John N. Faithorn and the Chicago & Alton Railway Company and of the three several petitions for writ of error of the said Fred A. Wann, John N. Faithorn and The Chicago & Alton Railway Company, and of the proceedings had in said District Court in the above entitled cause No. 3627 necessary to the hearing in said Circuit Court of Appeals of said several writs of error.

And on good cause shown, it is ordered that the time for filing the record herein in pursuance of said writ of error be and the same is hereby extended to and including the 10th day of September, A. D. 1906.

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for Seventh Circuit, do hereby certify that the foregoing typewritten pages, numbered from one to two, inclusive, contain a

true copy of the order entered July 16, 1906, in the case of The Chicago & Alton Railway Company *vs.* United States of America No. 1303, October Term, 1905, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and
79 affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 17th day of July A. D. 1906.

EDWARD M. HOLLOWAY,
[SEAL.] *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

Know All Men by These Presents, That we, Chicago & Alton Railway Company (an Illinois Corporation) ....., as principal, and Illinois Surety Company (an Illinois corporation) ..... as surety, are held and firmly bound unto the United States of America in the full and just sum of forty thousand dollars ($40,000.00), to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 16th day of July, A. D. 1906.

Whereas, lately at the July term, A. D. 1906, of the District Court of the United States for the Northern District of Illinois, Northern Division, in a cause pending in said Court between the United States of America, plaintiff, and said Chicago & Alton Railway Company ....., impleaded with Fred. A. Wann and John N. Faithorn ....., defendants, a judgment and sentence were rendered against said Chicago & Alton Railway Company..... and the said Chicago & Alton Railway Company ..... has prayed and been allowed a writ of error from the United States Circuit Court of Appeals for the Seventh Circuit to the said United States District Court to reverse the judgment and sentence in the aforesaid suit;

Now, the condition of the said obligation is such that if the said Chicago & Alton Railway Company ..... shall appear in the said Circuit Court of Appeals on the 2nd day of October, A. D. 1906, and from day to day thereafter in said court until said cause shall be finally disposed of and shall abide by and obey the judgment and order made by the said Circuit Court of Appeals ..... in said cause and shall pay the said judgment against him if the same shall be affirmed, and if he shall appear for trial in the said District Court of the United States for the Northern District of Illinois, Northern Division, on such day as may be appointed for a retrial by said District Court and abide by and obey all orders of said Court, provided said judgment and sentence against him shall
80 be reversed by said Circuit Court of Appeals .....

then the above obligation to be void; otherwise to remain in full force and virtue.

CHICAGO & ALTON RAILWAY CO.,
(Signed) By JOS. W. BLABON.

[The Chicago and Alton Railway Company, Incorporated 1900, State of Illinois.]

ILLINOIS SURETY COMPANY,
By WILLIAM COFFEEN,
Acting President.

[Illinois Surety Company, Incorporated 1905, Chicago, Illinois.]

Attest:
C. H. DAVIS,
Ass't Secretary.

Attest:
W. HERBERT STEWART, *Secretary.*

Approved: to act as supersedeas.
O. K. as to form and sureties:
(Signed) C. B. MORRISON,
U. S. Attorney.

Approved:
(Signed) EDWARD M. HOLLOWAY, *Clerk.*

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten page, contains a true copy of the bond of Chicago & Alton Railway Company filed July 16, 1906, in the case of Chicago & Alton Railway Company *vs.* United States of America,
81 No. 1303 October Term, 1905, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 17th day of July A. D. 1906.

EDWARD M. HOLLOWAY,
[SEAL.] *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States, for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between the United States of America and Fred A. Wann, John N. Faithorn and The Chicago and Alton Railway Company a manifest error hath happened, to the great damage of the said The Chicago & Alton Railway Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Seventh Circuit at Chicago, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller Chief Justice of
82 the United States, the 16th day of July, in the year of our Lord one thousand nine hundred and six.

[SEAL.] EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Allowed by
P. S. GROSSCUP, *Judge.*

(Endorsed:) Writ of Error. Filed July 16, 1906. T. C. MacMillan, Clerk, U. S. Dist. Court.

NORTHERN DISTRICT OF ILLINOIS, *Northern Division, ss:*

In obedience to the within writ and the said certain order of Honorable Peter S. Grosscup, presiding Judge of the said United States Circuit Court of Appeals for the Seventh Circuit entered in said United States Circuit Court of Appeals on the 16th day of July, A. D. 1906, whereby the clerk of said United States District Court for the Northern District of Illinois, Northern Division, was directed to make return of said three several writs of error, towit, a certain

writ of error wherein The Chicago and Alton Railway Company impleaded with John N. Faithorn and Fred A. Wann, is the plaintiff in error and the United States of America is the defendant in error, and a certain other writ of error wherein said John N. Faithorn impleaded with said The Chicago and Alton Railway Company and Fred A. Wann is the plaintiff in error, and the United States of America is the defendant in error, and a certain other writ of error wherein said Fred A. Wann impleaded with the Chicago and Alton Railway Company and John N. Faithorn is the plaintiff in error, by transmitting to said United States Circuit Court of Appeals a single true copy of the record Bill of Exceptions, said three several assignments of error by the said The Chicago and Alton Railway Company, John N. Faithorn and Fred A. Wann respectively, said three several petitions for writs of error by said The Chicago and Alton Railway Company, John N. Faithorn and Fred A. Wann respectively, and all of the proceedings had in said District Court in the foregoing entitled cause numbered 3627 lately pending in said
83 District Court wherein the United States of America was plaintiff and said The Chicago and Alton Railway Company, John N. Faithorn and Fred A. Wann were defendants necessary to the hearing in said United States Circuit Court of Appeals of said several writs of error. I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit a single, true and complete transcript of the record, said Bill of Exceptions, said three several assignments of error, said three several petitions for writs of error, and all of the proceedings had in said District Court in the foregoing entitled case numbered 3627 lately pending in said District Court wherein the United States of America was plaintiff and said The Chicago and Alton Railway Company John N. Faithorn and Fred A. Wann were defendants, this seventh day of September, A. D. 1906.

[SEAL.] T. C. MacMILLAN,
Clerk of the District Court of the United States
for the Northern District of Illinois.

And afterwards, towit, on the 16th day of July, A. D. 1906, there was filed in the Clerk's Office of said Court in the above entitled cause, a Petition for Writ of Error, the same being in the words and figures following, to wit:

In the District Court of the United States of America for the Northern District of Illinois, Northern Division.

No. 3627.

UNITED STATES OF AMERICA
vs.
FRED A. WANN, JOHN N. FAITHORN, and THE CHICAGO & ALTON RAILWAY COMPANY.

Indictment on Act of Feb. 4, 1887, as Amended by Act of Feb. 14, 1903 (Interstate Commerce Law).

Petition for Writ of Error.

Comes now John N. Faithorn, one of the defendants in the above entitled cause, and respectfully shows that a verdict of guilty
84 was rendered against him by the jury in the above entitled cause and that judgment and sentence was pronounced against him on the 11th day of July, A. D. 1906, upon said verdict by which said verdict, judgment and sentence your petitioner was convicted of a violation of a certain statute of the United States of America to-wit, of a violation of the Act of Congress of the United States of America of February 4th, 1887, as amended by the Act of Congress of the United States of America of February 14th, 1903 (commonly known as the Interstate Commerce Laws), and was adjudged and sentenced to pay to the United States of America two fines aggregating the sum of ten thousand dollars ($10,000.00). And your petitioner respectfully shows that in the said judgment and in the proceedings had prior thereto in the above entitled cause certain errors were committed to the prejudice of your petitioner; all of which will more in detail appear in the assignment of errors which is filed together with this petition.

Wherefore, said John N. Faithorn prays that a writ of error may issue in this behalf to the said District Court, returnable to the next term of the United States Circuit Court of Appeals for the Seventh Circuit for correcting the errors so complained of; that said writ of error may be made a supersedeas and that execution on said judgment and further proceedings in said District Court may be suspended and stayed; and that all further and necessary orders and process may be made to the end that the errors complained of may be corrected by said United States Circuit Court of Appeals for the Seventh Circuit, and that said judgment and sentence may be reversed, set aside and held for naught.

And said petitioner John N. Faithorn further shows that he was jointly indicted and tried in the above entitled cause in said District Court with Fred A. Wann and The Chicago & Alton Railway Company, a corporation, and that a joint verdict of guilty was returned by the jury in said cause against your petitioner and said Fred A. Wann and The Chicago & Alton Railway Company in the above

entitled cause, and that judgment and sentence was entered against Fred A. Wann, therein, whereby the said Fred A. Wann was adjudged and sentenced by said District Court to pay to the United States of America two fines aggregating ten thousand dollars ($10,000.00), and a judgment and sentence was rendered against The Chicago & Alton Railway Company in said cause whereby said The Chicago & Alton Railway Company was adjudged and sentenced by said District Court to pay to the United States of America two fines aggregating forty thousand dollars ($40,000.00); that said District Court has entered an order in said cause permitting said three defendants to file in said cause within ninety days from the said 11th day of July, A. D. 1906, a single bill of exceptions which bill of exceptions shall be taken and held to be a bill of exceptions in said cause of each of said defendants severally; that the said assignment of errors filed in said District Court in the above entitled cause on behalf of said petitioner is substantially a duplicate of a certain assignment of errors which has been filed in said cause by the said Fred A. Wann and also is a substantial duplicate of a certain assignment of errors which has been filed in said cause by said The Chicago & Alton Railway Company, and that both the said Fred A. Wann and said The Chicago & Alton Railway Company have filed in said cause petition for writs of error similar to this petition, praying that said judgments and sentences of the said District Court may be reversed and set aside and held for naught.

85

Wherefore, your petitioner prays an order directing the Clerk of said District Court to make a return of said three several writs of error to be granted in this cause on behalf of your petitioner and of said Fred A. Wann and of said The Chicago & Alton Railway Company by transmitting to said United States Circuit Court of Appeals a single and true copy of the record in the above entitled cause, of said bill of exceptions, and of said three several assignments of error, and of said three several writs of error, and of the proceedings in said court in said cause No. 3627, necessary to the hearing in said United States Circuit Court of Appeals of said three several writs of error.

WINSTON, PAYNE & STRAWN,
FREDERICK S. WINSTON, &
RALPH M. SHAW,
Attorneys for said John N. Faithorn.

Endorsed: No. 3627. In the District Court of the United States of America for the Northern District of Illinois, Northern Division. United States of America *vs.* Fred A. Wann, John N. Faithorn, and The Chicago & Alton Railway Company. Petition for Writ of Error of Defendant John N. Faithorn. Filed July 16, 1906. T. C. MacMillan, Clerk. Winston, Payne & Strawn, Attorneys at Law, First National Bank Building, Chicago.

86 And afterwards, towit, on the 16th day of July, A. D. 1906, there was filed in the Clerk's office of said Court, in the above

entitled cause, an Assignment of Errors, same being in the words and figures following, towit:

In the District Court of the United States of America for the Northern District of Illinois, Northern Division.

No. 3627.

UNITED STATES OF AMERICA
vs.
FRED A. WANN, JOHN S. FAITHORN, and THE CHICAGO & ALTON RAILWAY COMPANY.

Indictment on Act of Feb. 4, 1887, as Amended by Act of Feb. 11, 1903 (Interstate Commerce Law).

Assignment of Errors.

And now comes the defendant, John S. Faithorn, by Winston, Payne & Strawn, Frederick S. Winston and Ralph M. Shaw, his attorneys, and in connection with his petition for a writ of error herein, says that in the records and proceedings and during the trial of the above entitled cause in the said District Court error has intervened to his prejudice, and this defendant here assigns the following errors, to-wit:

1. Said indictment and each of the counts thereof fails to charge against this defendant any offense under the laws of the United States.

2. The Court erred in refusing to admit on the trial of said cause proper and competent evidence offered on the part of this defendant, to-wit:

Evidence proving that the amount of one dollar per car referred to in each of the first eight counts of the indictment was less than the fair and reasonable value of the trackage furnished by the Schwarzchild & Sulzberger Company, and that the sum of one dollar per car referred to in the said first eight counts is less than reasonable compensation for the use of said tracks owned, constructed, furnished and maintained by said Schwarzschile & Sulzberger Company.

3. The Court erred in improperly instructing the jury in said cause in the following particulars, to-wit:

87 Gentlemen of the jury, you have heard what the court has said as to the court's views on the law governing the matter which has been on trial before you. You have also heard the facts. I now say to you that it is your duty to accept the court's view on the law as the law of this case. Bearing this in mind, if you find from the evidence that when the Alton, the defendant, the Chicago & Alton Railway Company, paid to the Schwarzschild & Sulzberger Company one dollar on each car of that company's product, coming from that company's plant over the Belt tracks to the Alton Road amounted to the defendant, Chicago & Alton Railway Company, thereby giving to Schwarzschild & Sulzberger Company a rebate or

commission or discrimination in respect to the transportation of property of the Schwarzschild & Sulzberger Company in interstate or foreign commerce, and I charge you as a fact that the commerce was interstate, and that by means thereof the Schwarzschild & Sulzberger Company's property was transported at a rate less than the published tariff of the Chicago & Alton Railway Company, you will find the defendant, the Chicago & Alton Railway Company, guilty, as charged in the first eight counts of this indictment, and you will apply what I have said respecting your consideration of this case as to the Chicago & Alton Railway Company to the defendants Faithorn and Wann, vice-president and general freight agent, respectively, of the Chicago & Alton Railway Company. If you don't believe from the evidence that this payment does amount to a rebate, concession or discrimination, whereby the property of this packing company was transported at less than the published tariff rate, as indicated by my instruction, you will find that the defendants, and each of them, — not guilty of the charges, and all of them, under the first eight counts of this indictment. To find the defendants guilty, you must believe that the facts show that this payment of one dollar by the railway company and its officers to the packing company amounted to a rebate, concession, or discrimination to the packing company in respect to the transportation of the property of that packing company, and that thereby the packing company had its property transported at a less sum than that named in the tariff rate, beyond a reasonable doubt. The facts admitted in the case are that the Alton Company published its schedules, showing its through rate from Kansas City to points east; that these schedules cover and include the switching charges of the Kansas City Belt Line, which line
88 connected the Alton track with the private track of Schwarzschild & Sulzberger; that having collected from Schwarzschild & Sulzberger this through rate, the defendants gave back to Schwarzschild & Sulzberger one dollar on each car so moved. The position of the defendants is that one dollar was paid for the use of Schwarzschild & Sulzberger's private track, laid on their own ground, connecting their own plant, their own shipping docks with the Belt track. The tariff schedules were silent as to this arrangement. Whether a violation of the law exists because of the failure of the schedules to mention this one dollar payment by the defendants to Schwarzschild & Sulzberger is not before you for determination. The sole question for you to determine is whether this payment, under the circumstances, amounted to a rebate and concession, as indicated in my instruction. I instructed the jury, and I instructed them to find a verdict of guilty, that is what it would be tantamount to. The jury have the court's opinion, and if you find the defendants guilty, the form of your verdict will be, "We, the jury, find the defendants guilty as charged in the first eight counts of the indictment," and if you find the defendants not guilty the form of your verdict will be, "We, the jury, find the defendants not guilty."

4. The Court erred in improperly refusing to instruct the jury as requested by this defendant in the following particulars, to-wit:

The court instructs the jury to find the defendants and each of them not guilty as to each and every count of said *defendant*.

5. The verdict of the jury is contrary to the law.

6. The verdict of the jury is contrary to the evidence in the case.

7. The Court erred in overruling this defendant's motion for a new trial in said cause.

8. The Court erred in denying the motion of this defendant in arrest of judgment in said cause.

9. The Court erred in entering a judgment and sentence in said cause.

10. The judgment in said cause is contrary to the Statutes of the United States.

11. The judgment and sentence of the Court is unreasonable and oppressive.

12. The fine imposed by said Court against this defendant is in excess of the maximum fine which may be imposed upon
89 this defendant under said indictment under the Statutes of the United States.

13. The fine imposed upon this defendant and the judgment of said Court entered thereon is contrary to law.

Wherefore, said John N. Faithorn, by reason of the errors aforesaid, prays that said judgment and sentence against him the said John N. Faithorn may be reversed, set aside and held for naught.

WINSTON, PAYNE & STRAWN,
FREDERICK S. WINSTON,
RALPH M. SHAW,
Attorneys for Defendant John N. Faithorn.

Endorsed: No. 3627 In the District Court of the United States of America for the Northern District of Illinois, Northern Division. United States of America *vs.* Fred A. Wann, John N. Faithorn and The Chicago & Alton Railway Company. Assignment of Errors of Defendant John N. Faithorn Filed July 16, 1906, T. C. MacMillan, Clerk. Winston, Payne & Strawn, Attorneys at Law, First National Bank Building, Chicago.

MONDAY, *July* 16, 1906.

Before Hon. Peter S. Grosscup, Presiding Judge.

JOHN N. FAITHORN
vs.
UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Northern Division.

Let a writ of error issue from the United States Circuit Court of Appeals for the Seventh Circuit to the United States District Court of the Northern Division of the Northern District of Illinois as prayed for in said petition for writ of error of John N. Faithorn, and let said writ of error operate as a supersedeas staying the execution of the judgment and sentence pronounced in said District Court

against said John N. Faithorn during the pendency of said writ of error and until the further order of said Circuit Court of Ap-
90 peals, upon the filing with the Clerk of said United States Circuit Court of Appeals of a good and sufficient bond in the sum of ten thousand dollars ($10,000.00), conditioned as required by law, with sureties to be approved by the Clerk of said Court.

And the Clerk of said District Court is hereby directed to make return of the three writs of error sued out and allowed in said cause in behalf of said Fred A. Wann and of said John N. Faithorn and of said The Chicago & Alton Railway Company by transmitting to said Clerk of the United States Circuit Court of Appeals a single and true copy of the record and the proceedings in the above entitled cause and of the bill of exceptions in said cause and of the three several assignments of error of said Fred A. Wann, John N. Faithorn and The Chicago & Alton Railway Company and of the three several petitions for writ of error of the said Fred A. Wann, John N. Faithorn and The Chicago & Alton Railway Company and of the proceedings had in said District Court in the above entitled cause No. 3627 necessary to the hearing in said Circuit Court of Appeals of said three several writs of error.

And on good cause shown, it is ordered that the time for filing the record herein in pursuance of said writ of error be and the same is hereby extended to and including the 10th day of September, A. D. 1906.

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages numbered from one to two, inclusive, contain a true copy of the order entered July 16, 1906 in the case of John N. Faithorn *vs.* United States of America No. 1304, October Term, 1905, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the
91 Seventh Circuit, at the City of Chicago, this 17th day of July, A. D. 1906.

EDWARD M. HOLLOWAY,

[SEAL.] *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

Know All Men by These Presents, That we, John N. Faithorn of the City of Chicago, State of Illinois, as principal, and Illinois Surety Company (an Illinois corporation) as surety, are held and firmly bound unto the United States of America in the full and just sum of ten thousand dollars ($10,000.00), to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 16th day of July, A. D. 1906.

Whereas, lately at the July term, A. D. 1906, of the District Court of the United States for the Northern District of Illinois, Northern Division, in a cause pending in said court between the United States of America, plaintiff, and said John N. Faithorn ...., impleaded with Fred A. Wann and Chicago & Alton Railway Company ....., defendants, a judgment and sentence were rendered against said John N. Faithorn .... and the said John N. Faithorn .... has prayed and been allowed a writ of error from the United States Circuit Court of Appeals for the Seventh Circuit to the said United States District Court to reverse the judgment and sentence in the aforesaid suit;

Now, the condition of the said obligation is such that if the said John N. Faithorn ..... shall appear in person in the said Circuit Court of Appeals ..... on the 2nd day of October, A. D. 1906, and from day to day thereafter in said court, until said cause shall be finally disposed of and shall abide by and obey the judgment and order made by the said Circuit Court of Appeals ..... in said cause and shall pay the said judgment against him if the same shall be affirmed, and if he shall appear for trial in the said District Court of the United States for the Northern District of Illinois, Northern Division, on such day as may be appointed for a retrial by said District Court and abide by and obey all orders of said Court,
92 provided said judgment and sentence against him shall be reversed by said Circuit Court of Appeals then the above obligation to be void; otherwise to remain in full force and virtue.

JOHN N. FAITHORN, [SEAL.]
ILLINOIS SURETY COMPANY,
By WILLIAM COFFEEN,
Acting President.

[Illinois Surety Company, Incorporated 1905, Chicago, Illinois.]

Attest:
(Signed) W. HERBERT STEWART, *Secretary.*

Approved to act as supersedeas.
O. K. as to form and sureties:
(Signed) C. B. MORRISON,
U. S. Attorney.

Approved:
(Signed) EDWARD M. HOLLOWAY, *Clerk.*

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten page contains a true copy of the bond of John N. Faithhorn filed July 16, 1906, in the case of John N. Faithorn, *vs.* United States of America No. 1304, October Term, 1905, as the same

remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 17th day of July A. D. 1906.

EDWARD M. HOLLOWAY,
[SEAL.] *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

93 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the District Court of the United States for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between United States of America and Fred A. Wann, John N. Faithorn and The Chicago and Alton Railway Company a manifest error hath happened, to the great damage of the said John N. Faithorn as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Seventh Circuit at Chicago, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of July, in the year of our Lord one thousand nine hundred and six.

[SEAL.] EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Allowed by
P. S. GROSSCUP, *Judge.*

Endorsed: Writ of Error. Filed July 16, 1906. T. C. MacMillan, Clerk U. S. Dist. Court.

94 NORTHERN DISTRICT OF ILLINOIS, *Northern Division, ss:*

In obedience to the within writ and the said certain order of Honorable Peter S. Grosscup, presiding Judge of the said United States Circuit Court of Appeals for the Seventh Circuit entered in said United States Circuit Court of Appeals on the 16th day of July, A. D.

1906, whereby the clerk of said United States District Court for the Northern District of Illinois, Northern Division, was directed to make return of said three several writs of error, towit, a certain writ of error wherein The Chicago and Alton Railway Company impleaded with John N. Faithorn and Fred A. Wann, is the plaintiff in error and the United States of America is the defendant in error, and a certain other writ of error wherein said John N. Faithorn impleaded with said The Chicago and Alton Railway Company and Fred A. Wann is the plaintiff in error, and the United States of America is the defendant in error, and a certain other writ of error wherein said Fred A. Wann impleaded with the Chicago and Alton Railway Company and John N. Faithorn is the plaintiff in error, by transmitting to said United States Circuit Court of Appeals a single true copy of the record Bill of Exceptions, said three several assignments of error by the said The Chicago and Alton Railway Company, John N. Faithorn and Fred A. Wann respectively, said three several petitions for writs of error by said The Chicago and Alton Railway Company, John N. Faithorn and Fred A. Wann respectively, and all of the proceedings had in said District Court in the foregoing entitled cause numbered 3627 lately pending in said District Court wherein the United States of America was plaintiff and said The Chicago and Alton Railway Company, John N. Faithorn and Fred A. Wann were defendants necessary to the hearing in said United States Circuit Court of Appeals of said several writs of error, I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit a single, true and complete transcript of the record, said Bill of Exceptions, said three several assignments of error, said three several petitions for writs of error, and all of the proceedings had in said District Court in the foregoing entitled case numbered 3627 lately pending in said District Court wherein the United States of America was plaintiff and said The Chicago and Alton Railway Com-
95 pany, John N. Faithorn and Fred A. Wann were defendants, this seventh day of September, A. D. 1906.

[SEAL.] T. C. MacMILLAN,
Clerk of the District Court of the United States for the Northern District of Illinois.

And afterwards, to wit, on the 16th day of July, A. D. 1906, there was filed in the Clerk's Office of said Court in the above entitled cause, a Petition for Writ of Error, the same being in the words and figures following, to wit:

In the District Court of the United States of America for the Northern District of Illinois, Northern Division.

No. 3627.

UNITED STATES OF AMERICA
vs.
FRED A. WANN, JOHN N. FAITHORN, and THE CHICAGO & ALTON RAILWAY COMPANY.

Indictment on Act of Feb. 4, 1887, as Amended by Act of Feb. 11, 1903 (Interstate Commerce Law).

Petition for Writ of Error.

Comes now Fred A. Wann, one of the defendants in the above entitled cause, and respectfully shows that verdict of guilty was rendered against him by the jury in the above entitled cause and that judgment and sentence were pronounced against him on the 11th day of July, A. D. 1906, upon said verdict by which said verdict, judgment and sentence your petitioner was convicted of a violation of a certain statute of the United States of America, to-wit, of a violation of the Act of Congress of the United States of America of February 4th, 1887, as amended by the Act of Congress of the United States of America of February 11th, 1903 (commonly known as the Interstate Commerce Laws), and was adjudged and sentenced to pay to the United States of America two fines aggregating the sum of ten thousand dollars ($10,000.00). And your petitioner respect-
96 fully shows that in the said judgment and in the proceedings had prior thereto in the above entitled cause certain errors were committed to the prejudice of your petitioner; all of which will more in detail appear in the assignment of errors which is filed together with this petition.

Wherefore, said Fred A. Wann prays that a writ of error may issue in this behalf to the said District Court, returnable to the next term of the United States Circuit Court of Appeals for the Seventh Circuit for correcting the errors so complained of; that said writ of error may be made a supersedeas and that execution on said judgment and further proceedings in said District Court may be suspended and stayed, and that all further and necessary orders and process may be made to the end that the errors complained of may be corrected by said United States Circuit Court of Appeals for the Seventh Circuit, and that said judgment and sentence may be reversed, set aside and held for naught.

And said petitioner Fred A. Wann further shows that he was jointly indicted and tried in the above entitled cause in said District Court with John N. Faithorn and The Chicago & Alton Railway Company, a corporation, and that a joint verdict of guilty was returned by the jury in said cause against your petitioner and said John N. Faithorn and The Chicago & Alton Railway Company in

the above entitled cause, and that judgment and sentence was entered against John N. Faithorn, therein, whereby the said John N. Faithorn was adjudged and sentenced by said District Court to pay to the United States of America two fines aggregating ten thousand dollars ($10,000.00), and a judgment and sentence was rendered against The Chicago & Alton Railway Company in said cause whereby said The Chicago & Alton Railway Company was adjudged and sentenced by said District Court to pay to the United States of America two fines aggregating forty thousand dollars ($40,000.00); that said District Court has entered an order in said cause permitting said three defendants to file in said cause within ninety days from the said 11th day of July, A. D. 1906, a single bill of exceptions which bill of exceptions shall be taken and held to be a bill of exceptions in said cause of each of said defendants severally; that the said assignment of errors filed in said District Court in the above entitled cause on behalf of said petitioner is substantially a duplicate of a certain assignment of errors which was been filed in said cause by said John N. Faithorn and also is a substantial duplicate
97 of a certain assignment of errors which has been filed in said cause by said The Chicago & Alton Railway Company, and that both the said John N. Faithorn and said The Chicago & Alton Railway Company have filed in said cause petitions for writs of error similar to this petition, praying that said judgments and sentences of the said District Court may be reversed and set aside and held for naught.

Wherefore, your petitioner prays an order directing the Clerk of said District Court to make a return of said three several writs of error to be granted in this cause on behalf of your petitioner and of said John N. Faithorn and of said The Chicago & Alton Railway Company by transmitting to said United States Circuit Court of Appeals a single and true copy of the record in the above entitled cause, of said bill of exceptions, and of said three several assignments of errors, and of said three several writs of error, and of the proceedings in said court in said cause No. 3627, necessary to the hearing in said United States Circuit Court of Appeals of said three several writs of error.

WINSTON, PAYNE & STRAWN,
FREDERICK S. WINSTON &
RUDOLPH M. SHAW,
Attorneys for said Fred A. Wann.

Endorsed: No. 3627. In the District Court of the United States of America for the Northern District of Illinois, Northern Division. United States of America *vs.* Fred A. Wann, John N. Faithorn and The Chicago & Alton Railway Company. Petition for Writ of Error of Defendant Fred A. Wann. Filed July 16, 1906. T. C. MacMillan, Clerk. Winston, Payne & Strawn, Attorneys at Law, First National Bank Building, Chicago.

And afterwards, towit, on the 16th day of July, A. D. 1906, there was filed in the Clerk's office of said Court, in the above entitled

cause, an Assignment of Errors, same being in the words and figures following, towit:

98 In the District Court of the United States of America for the Northern District of Illinois, Northern Division.

No. 3627.

UNITED STATES OF AMERICA
vs.
FRED A. WANN, JOHN S. FAITHORN, and THE CHICAGO & ALTON RAILWAY COMPANY.

Indictment on Act of Feb. 4, 1887, as Amended by Act of Feb. 14, 1903 (Interstate Commerce Law).

Assignment of Errors.

And now comes the defendant, Fred A. Wann, by Winston, Payne & Strawn, Frederick S. Winston and Ralph M. Shaw, his attorneys, and in connection with his petition for a writ of error herein, says that in the records and proceedings and during the trial of the above entitled cause in the said District Court error has intervened to his prejudice, and this defendant here assigns the following errors, to-wit:

1. Said indictment and each of the counts thereof fails to charge against this defendant any offense under the laws of the United States.

2. The Court erred in refusing to admit on the trial of said cause proper and competent evidence offered on the part of this defendant, to-wit:

Evidence proving that the amount of one dollar per car referred to in each of the first eight counts of the indictment was less than the fair and reasonable value of the trackage furnished by the Schwarzschild & Sulzberger Company, and that the sum of one dollar per car referred to in said first eight counts is less than reasonable compensation for the use of said tracks owned, constructed, furnished and maintained by said Schwarzschild & Sulzberger Company.

3. The court erred in improperly instructing the jury in said cause in the following particulars, to-wit:

Gentlemen of the jury, you have heard what the court has said as to the court's view on the law governing the matter which has been on trial before you. You have also heard the facts. I now say to you that it is your duty to accept the court's view on the law
99 as the law of this case. Bearing this in mind, if you find from the evidence that when the Alton, the defendant, the Chicago & Alton Railway Company, paid to the Schwarzschild & Sulzberger Company one dollar on each car of that company's product, coming from that company's plant over the Belt tracks to the Alton Road amounted to the defendant, Chicago & Alton Railway Company, thereby giving to Schwarzschild & Sulzberger Company a rebate or

commission or discrimination in respect to the transportation of property of the Schwarzschild & Sulzberger Company *a rebate or commission or discrimination in respect to the transportation of property of the Schwarzschild & Sulzberger Company* in interstate or foreign commerce, and I charge you as a fact that the commerce was interstate, and that by means thereof the Schwarzschild & Sulzberger Company's property was transported at a less rate than the published tariff of the Chicago & Alton Railway Company, you will find the defendant, the Chicago & Alton Railway Company, guilty, as charged in the first eight counts of this indictment, and you will apply what I have said respecting your consideration of this case as to the Chicago & Alton Railway Company to the defendants Faithorn and Wann, vice-president and general freight agent, respectively, of the Chicago & Alton Railway Company. If you don't believe from the evidence that this payment does amount to a rebate, concession or discrimination, whereby the property of this packing company was transported at less than the published tariff rate, as indicated by my instruction, you will find that the defendants, and each of them, not guilty of the charges, and all of them, under the first eight counts of this indictment. To find the defendants guilty, you must believe that the facts show that this payment of one dollar by the railway company and its officers to the packing company amounted to a rebate, concession, or discrimination to the packing company in respect to the transportation of the property of that packing company, and that thereby the packing company had its property transported at a less sum than that named in the tariff rate, beyond a reasonable doubt. The facts admitted in the case are that the Alton Company published its schedules, showing its through rate from Kansas City to points east; that these schedules cover and include the switching charges of the Kansas City Belt Line, which line connected the Alton track with the private track of Schwarzschild & Sulzberger; that having collected from Schwarzschild & Sulzberger this through rate, the defendants gave back to Schwarzschild & Sulzberger one dollar on each car so moved. The position of the defendants is that one dollar was paid for the use of Schwarzschild & Sulzberger's private track, laid on their own ground, connecting their own plant, their own shipping docks with the Belt track. The tariff schedules were silent as to this arrangement. Whether a violation of the law exists because of the failure of the schedules to mention this one dollar payment by the defendants to Schwarzschild & Sulzberger is not before you for determination. The sole question for you to determine is whether this payment, under the circumstances, amounted to a rebate and concession, as indicated in my instruction. I instructed the jury, and I instructed them to find a verdict of guilty, that is what it would be tantamount to. The jury have the court's opinion, and if you find the defendants guilty, the form of your verdict will be, "We, the jury, find the defendants guilty as charged in the first eight counts of the indictment;" and if you find the defendants not guilty the form of your verdict will be, "We, the jury, find the defendants not guilty."

The Court erred in improperly refusing to instruct the jury as requested by this defendant in the following particulars, to-wit:

The court instructs the jury to find the defendants and each of them not guilty as to each and every count of said indictment.

5. The verdict of the jury is contrary to the law.

6. The verdict of the jury is contrary to the evidence in the case.

7. The Court erred in overruling this defendant's motion for a new trial in said cause.

8. The Court erred in denying the motion of this defendant in arrest of judgment in said cause.

9. The Court erred in entering a judgment and sentence in said cause.

10. The judgment in said cause is contrary to the Statutes of the United States.

11. The judgment and sentence of the Court is unreasonable and oppressive.

12. The fine imposed by said Court against this defendant is in excess of the maximum fine which may be imposed upon this defendant under said indictment under the Statutes of the United States.

101 13. The fine imposed upon this defendant and the judgment of said Court entered thereon is contrary to law.

Wherefore, said Fred A. Wann, by reason of the errors aforesaid, prays that said judgment and sentence against him the said Fred A. Wann may be reversed, set aside and held for naught.

WINSTON, PAYNE & STRAWN,
FREDERICK S. WINSTON,
RALPH M. SHAW,
Attorneys for Defendant Fred A. Wann.

Endorsed: No. 3627. In the District Court of the United States of America for the Northern District of Illinois, Northern Division. United States of America *vs.* Fred A. Wann, John N. Faithorn and The Chicago & Alton Railway Company. Assignment of Errors of Defendant Fred A. Wann. Filed July 16, 1906. T. C. MacMillan, Clerk. Winston, Payne & Strawn, Attorneys at Law, First National Bank Building, Chicago.

MONDAY, *July* 16, 1906.

Before Hon. Peter S. Grosscup, Presiding Judge.

FRED A. WANN
vs.
UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Northern Division.

Let a writ of error issue from the United States Circuit Court of Appeals for the Seventh Circuit to the United States District Court of the Northern Division of the Northern District of Illinois as prayed for in said petition for writ of error of Fred A. Wann, and let said

writ of error operate as a supersedeas staying the execution of the judgment and sentence pronounced in said District Court against said Fred A. Wann during the pendency of said writ of error and until the further order of said Circuit Court of Appeals, upon the filing with the Clerk of said United States Circuit Court of Appeals of a good and sufficient bond in the sum of ten thousand dol-
102 lars ($10,000.00), conditioned as required by law, with sureties to be approved by the Clerk of said Court.

And the Clerk of said District Court is hereby directed to make return of the three several writs of error sued out and allowed in said cause in behalf of said Fred A. Wann and of said John N. Faithorn and of said The Chicago & Alton Railway Company by transmitting to said Clerk of the United States Circuit Court of Appeals a single and true copy of the record and the proceedings in the above entitled cause and of the bill of exceptions in said cause and of the three several assignments of error of said Fred A. Wann, John N. Faithorn and The Chicago & Alton Railway Company and of the three several petitions for writ of error of the said Fred A. Wann, John N. Faithorn and The Chicago & Alton Railway Company and of the proceedings had in said District Court in the above entitled cause No. 3627 necessary to the hearing in said Circuit Court of Appeals of said three several writs of error.

And on good cause shown, it is ordered that the time for filing the record herein in pursuance of said writ of error be and the same is hereby extended to and including the 10th day of September, A. D. 1906.

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages, numbered from one to two, inclusive, contain a true copy of the order entered July 16, 1906 in the case of Fred A. Wann *vs.* United States of America No. 1305, October Term, 1905, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals of the
103 Seventh Circuit, at the City of Chicago, this 17th day of July A. D. 1906.

[SEAL.] EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Bond on Writ of Error, Filed July 16, 1906.

Know All Men by These Presents, That Fred A. Wann of the City of Chicago, State of Illinois, as principal, and Illinois Surety Company (an Illinois Corporation) as surety, are held and firmly bound unto the United States of America in the full and just sum

of ten thousand dollars ($10,000.00), to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 16th day of July, A. D. 1906.

Whereas, lately at the July term, A. D. 1906, of the District Court of the United States for the Northern District of Illinois, Northern Division, in a cause pending in said Court between the United States of America, plaintiff and said Fred A. Wann, impleaded with John N. Faithorn and Chicago & Alton Railway Company, defendants, a judgment and sentence were rendered against said Fred A. Wann, and the said Fred A. Wann has prayed and been allowed a writ of error from the United States Circuit Court of Appeals for the Seventh Circuit to the said United States District Court to reverse the judgment and sentence in the aforesaid suit:

Now, the condition of the said obligation is such that if the said Fred A. Wann shall appear in person in the said Circuit Court of Appeals on the 2nd day of October, A. D. 1906, and from day to day thereafter in said Court until said cause shall be finally disposed of and shall abide by and obey the judgment and order made by the said Circuit Court of Appeals in said cause and shall pay the said judgment against him if the same shall be affirmed, and if he shall appear for trial in the said District Court of the United States for the Northern District of Illinois, Northern Division, on such day as may be appointed for a retrial by said District Court and abide by and obey all orders of said Court, provided said judgment and sentence against him shall be reversed by said Circuit Court of Appeals
104 then the above obligation to be void; otherwise to remain in full force and virtue.

(Signed) FRED A. WANN, [SEAL.]
ILLINOIS SURETY COMPANY,
(Signed) By WILLIAM COFFEEN,
Acting President.

[Illinois Surety Company, Incorporated 1905, Chicago, Ill.]

Attest:
(Signed) W. HERBERT STEWART, *Secretary.*

Approved: to act as supersedeas.
O. K. as to form and sureties.
(Signed) C. B. MORRISON,
U. S. Attorney.

Approved:
(Signed) EDWARD M. HOLLOWAY, *Clerk.*

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten page contains a true copy of the bond of Fred A. Wann filed July 16, 1906, in the case of Fred A. Wann *vs.* United

States of America, No. 1305, October Term, 1905, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 17th day of July A. D. 1906.

EDWARD M. HOLLOWAY,

[SEAL.] *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

105 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States, for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between United States of America and Fred A. Wann John N. Faithorn and The Chicago and Alton Railway Company a manifest error hath happened, to the great damage of the said Fred A. Wann. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Seventh Circuit at Chicago, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United — Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of July, in the year of our Lord one thousand nine hundred and six.

EDWARD M. HOLLOWAY,

[SEAL.] *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

Allowed by
P. S. GROSSCUP, *Judge.*

Endorsed: Writ of Error. Filed July 16, 1906. T. C. MacMillan Clerk U. S. Dist. Court.

106 NORTHERN DISTRICT OF ILLINOIS. *Northern Division, ss:*

In obedience to the within writ and the said certain order of Honorable Peter S. Grosscup, presiding Judge of the said United States Circuit Court of Appeals for the Seventh Circuit entered in said United States Circuit Court of Appeals on the 16th day of July,

A. D. 1906, whereby the clerk of said United States District Court for the Northern District of Illinois, Northern Division, was directed to make return of said three several writs of error, towit, a certain writ of error wherein The Chicago and Alton Railway Company impleaded with John N. Faithorn and Fred A. Wann, is the plaintiff in error and the United States of America is the defendant in error, and a certain other writ of error where said John N. Faithorn impleaded with said The Chicago and Alton Railway Company and Fred A. Wann is the plaintiff in error, and the United States of America is the defendant in error, and a certain other writ of error wherein said Fred A. Wann impleaded with the Chicago and Alton Railway Company and John N. Faithorn is the plaintiff in error, by transmitting to said United States Circuit Court of Appeals a single true copy of the record Bill of Exceptions, said three several assignments of error by the said The Chicago and Alton Railway Company, John N. Faithorn and Fred A. Wann respectively, said three several petitions for writs of error by said The Chicago and Alton Railway Company, John N. Faithorn and Fred A. Wann respectively, and all of the proceedings had in said District Court in the foregoing entitled cause numbered 3627 lately pending in said District Court wherein the United States of America was plaintiff and said The Chicago and Alton Railway Company, John N. Faithorn and Fred A. Wann were defendants necessary to the hearing in said United States Circuit Court of Appeals of said several writs of error, I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit a single, true and complete transcript of the record, said Bill of Exceptions, said three several assignments of error, said three several petitions for writs of error, and all of the proceedings had in said District Court in the foregoing entitled case numbered 3627 lately pending in said District Court
107 wherein the United States of America was plaintiff and said The Chicago and Alton Railway Company, John N. Faithorn and Fred A. Wann were defendants, this Seventh day of September, A. D. 1906.

T. C. MacMILLAN,
[SEAL.] *Clerk of the District Court of the United States for the Northern District of Illinois.*

Certificate of Clerk.

In the District Court of the United States for the Northern District of Illinois, Northern Division.

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, Do Hereby Certify the above and foregoing to be a true and correct transcript of the record in Case No. 3627 wherein the United States is Plaintiff and The Chicago and Alton Railway Company, John N. Faithorn and Fred A.

Wann are Defendants, as the same appears from the records and files in said cause, now remaining in my custody and control.

In testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago in said District, this 7th day of September, A. D. 1906.

[SEAL.] T. C. MacMILLAN, *Clerk*.

108 At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held at the United States Court Rooms in the city of Chicago on the second day of October, 1906, of the October Term in the year of our Lord one thousand nine hundred and six and of our Independence the one hundred and thirty-first.

And afterwards, to-wit: On the thirtieth day of October, 1906, in the October term last aforesaid, there was filed in the office of the clerk of this court a stipulation of counsel, which stipulation is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D., 1905.

No. 1303.

THE CHICAGO & ALTON RAILWAY COMPANY, Plaintiff-in-Error,
vs.
UNITED STATES OF AMERICA, Defendant-in-Error.

No. 1304.

JOHN N. FAITHORN, Plaintiff-in-Error,
vs.
UNITED STATES OF AMERICA, Defendant-in-Error.

109 No. 1305.

FRED A. WANN, Plaintiff-in-Error,
vs.
UNITED STATES OF AMERICA, Defendant-in-Error.

Stipulation.

It is hereby stipulated by and between the parties to the three above entitled causes that one brief may be filed on behalf of all the plaintiffs in error and one brief on behalf of the defendant in error to cover all three causes, and said causes may be argued as one.

It is also stipulated that the time within which said plaintiff in error, under the rules of this court, is required to file briefs herein shall be extended to and including the 30th day of November, 1906.

and that the defendant in error shall have until the 8th day of January, 1907, to file its brief.

F. S. WINSTON,
JOHN BARTON PAYNE, &
R. M. SHAW,
Attorneys for the Chicago & Alton Railway Company.
JOHN N. FAITHORN AND
FRED A. WANN,
Plaintiffs in Error Respectively in the Above Three Causes.
EDWIN W. SIMS,
Attorney for United States of America, Defendant in Error in the Above Three Causes.

Endorsed: Filed Oct. 30, 1906. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the thirtieth day of October, 1906, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

110 TUESDAY, *October* 30, 1906.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Peter S. Grosscup, Circuit Judge presiding; Hon. Francis E. Baker, Circuit Judge; Hon. William H. Seaman, Circuit Judge; Edward M. Holloway, Clerk; Luman T. Hoy, Marshal.

1303.

CHICAGO & ALTON RAILWAY COMPANY
vs.
UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Upon filing of stipulation of counsel, it is ordered that the briefs filed in this cause may be used and considered as the briefs in cause No. 1304, John N. Faithorn *vs.* United States of America and in cause No. 1305, Fred A. Wann *vs.* United States of America. And it is further ordered that the time within which to file brief for plaintiff in error be and is hereby extended to and including November 30, 1906, and the time for filing brief for defendant in error, be and is hereby extended to January 8, 1907.

And afterwards, to-wit: On the second day of January, 1907, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

111 WEDNESDAY, *January* 2, 1907.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Peter S. Grosscup, Circuit Judge presiding. Hon. Francis E. Baker, Circuit Judge. Hon. Christian C. Kohlsaat, Circuit Judge. Edward M. Holloway, Clerk. Luman T. Hoy, Marshal.

1303.

THE CHICAGO & ALTON RAILWAY COMPANY
vs.
UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the court that this cause be, and the same is hereby set down for hearing January 23, 1907.

1304.

JOHN N. FAITHORN
vs.
UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the court that this cause, be, and the same is hereby set down for hearing January 23, 1907.

1305.

FRED A. WANN
vs.
UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the court that this cause be, and the same is hereby set down for hearing January 23, 1907.

112 And afterwards, to-wit: On the twenty-third day of January, 1907 in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

WEDNESDAY, *January* 23, 1907.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Peter S. Grosscup, Circuit Judge presiding. Hon. Francis E. Baker, Circuit Judge. Hon. William H. Seaman, Circuit Judge. Edward M. Holloway, Clerk. Luman T. Hoy, Marshal.

1303.

THE CHICAGO & ALTON RAILWAY COMPANY
vs.
UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. Ralph M. Shaw, counsel for plaintiff-in-error, and by Mr. F. G. Hanchett, counsel for defendant-in-error, and the court having heard the same takes this matter under advisement.

1304.

JOHN N. FAITHORN
vs.
UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs
113 of counsel and on oral argument by Mr. Ralph M. Shaw, counsel for plaintiff-in-error, and by Mr. F. G. Hanchett, counsel for defendant-in-error, and the court having heard the same takes this matter under advisement.

1305.

FRED A. WANN
vs.
UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel

and on oral argument by Mr. Ralph M. Shaw, counsel for plaintiff-in-error, and by Mr. F. G. Hanchett, counsel for defendant-in-error, and the court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the sixteenth day of April, 1907, in the October term last aforesaid, there was filed in the office of the clerk of this court the opinion of the court in the three above entitled causes, which opinion is in the words and figures following, to-wit:

114 In the United States Circuit Court of Appeals for the Seventh Circuit.

Nos. 1303, 1304, 1305.

October Term, A. D. 1906. January Session, A. D. 1907.

THE CHICAGO & ALTON RAILWAY COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA.

JOHN H. FAITHORN, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA.

FRED A. WANN, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Before Grosscup, Baker, and Seamon, Circuit Judges.

The case is stated in the opinion.

BAKER, *Circuit Judge*, delivered the opinion of the court:

Plaintiffs in error were jointly convicted of violating that part of section 1 of the Elkins Act which inhibits the giving of "any rebate * * * in respect of the transportation of any property in interstate or foreign commerce * * * whereby any such property shall by any device whatever be transported at a less rate than that published and filed." U. S. Comp. St., Sup. 1905, p. 599.

115 The government proved that the Chicago & Alton was an interstate common carrier, having a line extending eastward from Kansas City, Missouri; that the Kansas City Railway Company was an interstate common carrier between Kansas City, Kansas, and Kansas City, Missouri, having a belt line over which it hauled cars of freight from industries along its tracks to various

railroads; that the Schwarzschild & Sulzberger Company, a corporation, owned and operated a meat packing plant at Kansas City, Kansas, adjoining the tracks of the Belt Line; that the S. & S. Co. was not a common carrier; that within its plant, and running around and between various buildings thereof, the S. & S. Co. at a cost of $75,000 built about a mile and a half of tracks, switches and sidings, on which the annual outlay for maintenance and taxes was $1,200; that the S. & S. tracks connected with the Belt Line tracks at the property line; that the Alton had arrangements with the Belt Line and with eastern railroads whereby the Alton undertook to transport property in interstate commerce from Kansas City, Kansas, to seaboard cities; that the Alton published and filed schedules of rates for such transportation: that the Belt Line published and filed a rate of $3 a car for hauling cars of freight over its line from the S. & S. plant to the Alton; that the Alton transported various carloads of freight for the S. & S. Co. from Kansas City, Kansas, to eastern points, collected from the S. & S. Co. the full amount of the published rates, and paid to the Belt Line $3 a car, which amount was included in the Alton's published rates; and that the Alton, through plaintiffs in error Faithorn as vice-president and Wann as general freight agent, paid back to the S. & S. Co., under book-entries of "refund of terminal charges," $1 on each car for the use made of the S. & S. tracks in getting the S. & S. Co.'s cars of freight out upon the Belt Line's tracks.

At the conclusion of the government's evidence plaintiffs in error moved that the jury be directed to return a verdict of not guilty. This motion was overruled. Thereupon plaintiffs in error offered to prove that the use of the S. & S. tracks was reasonably worth $1 a car. The court excluded the proffered evidence.

These adverse rulings present but a single question. If the fact that the S. & S. Co.'s charge for the use of its tracks was reasonable would take the case out from under the statute, the burden
116 would lie upon the government, in order to bring the case within the statute, to prove that the charge was unreasonable; and this the government did not attempt to do. So the assignments of error center on the challenge of the sufficiency of the government's evidence to sustain the verdict of guilty.

Some discussion in briefs and in oral argument was had over the fact that the arrangement between the Alton and the S. & S. Co. was not published and filed with the Interstate Commerce Commission. The S. & S. Co. was not a common carrier, and therefore had nothing in the way of rates and charges to publish and file with the Commission. Shippers of course were interested to learn from the Alton's published schedules not only the rates between different points but also the terminal charges, if any, that were to be exacted of them in addition to the rates. We think it is clear that the shipping public were not concerned in what part of an Alton through rate was paid by the Alton to the New York Central or to any owner of tracks that were used in making the through shipment. But if divisions of rates or track rentals were required to be published, we think it is equally clear that a failure to publish could not make a rebate of what is not

a rebate, and on the other hand that publication could not save what is a rebate from being found to be a rebate. So the aforesaid matter of publication has nothing to do with the case.

Payment by the Alton to the S. & S. Co. was in the guise of a "refund of terminal charges," as though the Alton through oversight had collected more than the lawful charges and was rectifying the mistake. But as courts rightly are keen to penetrate an innocent appearing device to reach an illegal transaction, they should also be alert to save a lawful act though it be hid under a false cover. These plaintiffs in error should not be punished for methods of bookkeeping if the false entries represented in fact a lawful arrangement.

The real transaction was the payment by the Alton for the use of the S. & S. tracks in getting S. & S. freight out of the plant to the Belt Line. The consideration was not based on a fixed monthly or yearly rental, or on a percentage of the investment, but was determined by the amount of use measured by wheelage. But rentals on the basis of wheelage are unobjectionable if the parties have entered into a contract which in all other respects is lawful.

117 This contract was made on the Alton's part through its traffic department. We may know as a matter of common information that contracts respecting right of way, roadbed and track are usually made through the engineering or maintenance of ways department, and not through freight agents. But again, these plaintiffs in error should not be punished because the rental was measured by wheelage or because the contract was made by freight agents.

S. & S. received back a part of the money they paid the Alton for freight. That fact alone does not prove that the transaction constituted a rebate within the definition of the statute. A railroad may pay its lawful indebtedness to a shipper out of the money the shipper pays it for freight; or a shipper may pay the full freight partially in money and partially in canceled legal demands against the railroad. The statute's definition of a rebate is any device whereby any property in interstate or foreign commerce is transported at a less rate than that published and filed. So if the full rate be paid either in money or in money's worth, the parties can not be guilty of rebating. Of course the money's worth part of the payment might itself be used as a device whereby the property would be carried in interstate commerce at less than the published rate; but in this case the presumption must be indulged that the wheelage charge of $1 a car measured the true rental value of the S. & S. tracks.

The foregoing considerations compel us to the conclusion that the judgment can not be sustained except by holding that the contract between S. & S. Co. and the Alton was illegal and void.

The use that the contract provided for was the use that was made in hauling S. & S. freight from inside of the S. & S. plant out to the S. & S. property line, so that there it might be put on the Belt Line's track, which in these through routings is to be taken as a part of the Alton system. Plaintiffs in error defend the arrangement on the ground that an interstate common carrier has the right to pay a shipper a just allowance for the use of any instrumentality furnished to the carrier by the shipper in connection with the transportation

of the shipper's property. And attention is called to the closing paragraph of section 15 of the recent Hepburn Act as being declaratory of the law as it stood when the contract now in question was made: "If the owner of property transported under this act
118 directly or indirectly renders any service connected with such transportation or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable." It never has been unlawful for a railroad to lease cars from a shipper, like the Armour Co., any more than from a builder of cars, like the Pullman Co. But if cars are leased from a shipper, not only the Hepburn Act but also the Cullom and the Elkins Acts, as we regard them, prohibit the extension of favors to the shipper in the way of freight rates under cover of the lease. So, if a railroad in discharging its undertakings as an interstate common carrier may lease tracks from another railroad, we perceive no valid reason for denying a railroad the right to lease tracks from a shipper for a like purpose, provided the rental is fair and does not include, by being excessive, a concession from the established transportation rates. The trouble in this case, however, comes from the fact that the Alton did not take a lease of the S. & S. tracks for the purpose of discharging its undertakings as an interstate common carrier. It had undertaken to carry for all the shipping public a carload of meats from Kansas City, Kansas, to New York for $20, say. For that purpose it controlled, by means of its connections, a public highway. The S. & S. tracks were not a part of that highway. They were not used by the Alton in serving the shipping public generally. Their only use was in getting a particular shipper's freight from his own property out to the public highway. Suppose that the S. & S. Co., instead of ties and rails, had put down a paved roadway on its land, and that the Alton, in addition to the twenty dollars' worth of transportation it was giving to other shippers, furnished horses and wagons to haul the meats from the packing rooms to the Belt Line, would it be contended that the Alton could lawfully still further pay the S. & S. Co. for the use of the pavement? Or suppose that the S. & S. plant was all under one roof and that the trolleys which convey carcasses and cuts of meat from one department to another were so arranged that the finished product arrived at the property line adjoining the Belt tracks, could the Alton properly make an allowance for the use of the trolleys as instrumentalities furnished by the shipper in the transportation of property in interstate commerce? In our judgment, the jury were warranted in finding that the tracks in
119 question were plant facilities, as clearly as the suppositious pavement and trolleys would be plant facilities, and not instrumentalities for the Alton's use in discharging its duties to the public. Wherever the Alton needed tracks for that purpose, it could acquire the land by exercising the sovereign power of eminent domain which had been conferred upon it by the people. But manifestly the Alton could not condemn the S. & S. tracks for the sole purpose of hauling the S. & S. Co.'s product from its warehouse to the Alton's public highway, because that would be a private purpose. Whatever property the Alton could condemn, it could acquire by

deed or lease; but by taking a lease it could not change a private purpose or use into a public one. The lease of these plant facilities was therefore a device whereby the property of the S. & S. Co. was transported at $19 a car while other shippers were paying $20.

This case is ruled in principle, we believe, by the decision in *Wight v. United States*, 167 U. S. 512, that an arrangement whereby a particular shipper was allowed to offset against his freight bills the true value of the use of his teams in hauling the property from the railroad to his warehouse was a discrimination against other shippers of the same class of property in the same city who were compelled to pay the freight in full. It is contended that the citation is inapplicable because the question there was of discrimination and here of rebate. Under the Cullom Act the standard of comparison was the treatment of other shippers; it was necessary to prove not only that the favored shipper really paid less than the published rate but also that other shippers paid the full rate or a greater rate than that of the favored shipper. Under the Elkins Act the standard of comparison is the published rate; it is only necessary to prove that the favored shipper has had his property transported at a less rate than that published and filed. Both acts were aimed to kill favoritism, and the favoritism in the Wight case was of the same kind and effect as in this. The big manufacturer or dealer has all the advantage over his small competitor that he is legally or morally entitled to in his savings of labor cost and in buying his materials at greater discounts. The application of the maxims of merchandising to railroading was always counter to the common law pact between the railroads and the people. But it was not until
120 the government as *parens patriæ* was authorized to represent the scattered and unorganized sufferers from favoritism that any hope appeared of taking the railroad business out of the realm of private barter.

We exclude from the case, as not being within the issues, any question of the right of a railroad to render greater service or to furnish more facilities for one shipper than another for the same published charge. The issue here is the right to furnish the same or more at a less price.

GROSSCUP, *Circuit Judge*, concurring:

I cannot bring myself to the conclusion that until the cars loaded with the products of the S. & S. Company actually reached the rails of the Terminal Railroad Company, such products were not already in course of interstate transportation—that until the rails of the Terminal Company were reached, neither the shipper nor carrier were subject to the obligations, or entitled to the rights, that shippers and carriers are subject to, and acquire, only when the things to be shipped have reached the stage of being actually in course of interstate transportation. My personal view is that the moment the products of the S. & S. Company passed out of its hands into the cars of the Terminal Company for transportation, whether the cars thus receiving such products were at the time on the rails belonging to

the S. & S. Company, or on the rails belonging to the Railroad Company, the interstate transportation of those products had already commenced; and that the published rate is a rate for the whole of that transportation, from the moment it thus begins to the moment the goods reach their destination; from which it follows, it seems to me, that as against the S. & S. Company, notwithstanding the fact that the Railroad Company receives the goods at the S. & S. Company warehouses, and on its rails (no additional terminal charges having been fixed) the Railroad Company could not lawfully exact more than the regular published rates; while in the performance of its obligations to other shippers, under the Interstate Commerce law, it could not lawfully accept less. In other words, under the facts presented, the published rate is not affected by the fact that the cars were loaded at the S. & S. Company's warehouses, and not on the Company's rails—such place of loading being, along
121 with the Railroad Company's freight stations, "Kansas City" within the meaning of the published rates.

Now I am inclined strongly to the judgment that through contract with the parties interested, the Railroad Company could, at its own expense, lawfully have laid its own rails up to and along side of the S. & S. Company's warehouses, notwithstanding the fact that title to the land under the rails should remain in the S. & S. Company; or could have leased the rails laid by the S. & S. Company of that company; provided always that the transaction was not a subterfuge to cover up discriminations. But an arrangement of that kind between the two companies cannot, in my judgment, for reasons of public policy that the Interstate Commerce Act was intended to carry out, be lawfully based on division of rates, or in any other way be connected with, or affect, the rate making function of the Railroad Company; for to secure equality among shippers, the law commands, not only that the rates shall be equal, but that they shall be fixed and certain—subject to no addition or diminution against, or in favor of, any one—so fixed and certain that any shipper can with his head and pencil figure out from the tariff sheets just what the rate is, both for himself and for his competitors; from which it follows that, while the Railroad Company, through its appropriate department, might lawfully perhaps have leased these rails of the S. & S. Company, paying therefor a reasonable rental, it could not lawfully, for the reasons of public policy named, through its tariff department, and on the basis of a division of rates (the whole arrangement secret so far as the published tariff sheets were concerned) have made the arrangement that was offered as a defense to the offense prosecuted.

The judgment is affirmed.

122 And afterwards, on the same day, to-wit: On the sixteenth day of April, 1907, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, *April* 16, 1907.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Peter S. Grosscup, Circuit Judge presiding. Hon. Francis E. Baker, Circuit Judge. Hon. William H. Seaman, Circuit Judge. Hon. Christian C. Kohlsaat, Circuit Judge. Edward M. Holloway, Clerk. Luman T. Hoy, Marshal.

Before Hon. Peter S. Grosscup, Circuit Judge. Hon. Francis E. Baker, Circuit Judge. Hon. William H. Seaman, Circuit Judge.

1303.

THE CHICAGO & ALTON RAILWAY COMPANY
vs.
UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this court that the judgment of the said district court in this cause, be, and the same is hereby affirmed.

123 1304.

JOHN N. FAITHORN
vs.
UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this court that the judgment of the said district court in this cause, be, and the same is hereby affirmed.

1305.

FRED A. WANN
vs.
UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this court that the judgment of the said district court in this cause, be, and the same is hereby affirmed.

And afterwards, to-wit: On the first day of May, 1907, in the October term last aforesaid, came the plaintiffs in error in the three above entitled causes, by their counsel Mr. F. S. Winston, Mr. John Barton Payne, Mr. S. H. Strawn and Mr. Ralph M. Shaw, and filed in the office of the clerk of this court their petition for rehearing, in the words and figures following, to-wit:

124 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1905.

No. 1303.

THE CHICAGO & ALTON RAILWAY COMPANY, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

No. 1304.

JOHN N. FAITHORN, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

No. 1305.

FRED A. WANN, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

125 *Petition for Rehearing.*

Now come the plaintiffs in error, and each of them, in the above entitled causes, and they and each of them hereby respectfully petition this Honorable Court to vacate the order of affirmance heretofore entered herein on Tuesday, the 16th day of April, A. D. 1907, and to grant a rehearing in said causes.

In the event this Honorable Court shall decline to grant a rehearing in said causes, and each of them, the said plaintiffs in error and each of them hereby respectfully petition this Honorable Court to vacate the said order of affirmance heretofore entered herein, on said date, and to certify to the Supreme Court of the United States, in accordance with the statute in such case made and provided, the questions raised by the record in said causes, and to hold the final judgment order of this Honorable Court in abeyance until the said Supreme Court of the United States shall decide the questions so certified to it. The questions which the plaintiffs in error, and each of them, hereby respectfully request the court to certify to the Supreme Court are more particularly set forth in the arguments and suggestions filed herewith and made a part hereof.

Respectfully submitted,

F. S. WINSTON,
JOHN BARTON PAYNE,
S. H. STRAWN,
R. M. SHAW,
Attorneys for Plaintiffs in Error.

Endorsed: Filed May 1, 1907. Edward M. Holloway, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held at the United States Court Rooms in the City of Chicago in said Seventh Circuit on the first day of October, 1907, of the October Term in the year of our Lord one thousand nine hundred and seven and of our Independence the one hundred and thirty-second.

126 And afterwards, to wit: On the ninth day of October, 1907, in the October term last aforesaid, there was filed in the office of the clerk of this court the opinion of the court on petition for rehearing, which opinion is in the words and figures following, to-wit:

Nos. 1303, 1304, 1305.

October Term, 1907. October Session, 1907.

On Petition for Rehearing

Before Grosscup, Baker, and Seaman, Circuit Judges.

Per Curiam: The burden of the argument in support of the petition is that the opinion of the court promulgates the doctrine that it is unlawful "for a railroad company to acquire by lease or purchase or other contract the ownership or the right to use a track leading from its right of way to an industrial plant." The facts of the case do not require the affirmance of such a proposition; and we disclaim the inference which counsel draw from the language of the opinion. We do not elaborate because we believe that counsel on reading the opinion anew will have no difficulty in understanding that our judg-

ment of the character of the Alton's dominion over the S. & S. tracks was founded on our view that the evidence warranted the jury in finding that "the tracks were S. & S. plant facilities and not instrumentalities for the Alton's use in discharging its duties to the public."

The petition is overruled.

And afterwards, to-wit: On the same day, to-wit: On the ninth day of October, 1907, in the October term last aforesaid, the following further proceedings were had and entered of record to-wit:

127 WEDNESDAY, *October* 9, 1907.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Peter S. Grosscup, Circuit Judge presiding. Hon. Francis E. Baker, Circuit Judge. Hon. William H. Seaman, Circuit Judge. Edward M. Holloway, Clerk. Luman T. Hoy, Marshal.

1303.

THE CHICAGO & ALTON RAILWAY COMPANY
vs.
UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the court that the petition for rehearing in this cause be, and the same is hereby overruled.

1304.

JOHN N. FAITHORN
vs.
UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the court that the petition for rehearing in this cause, be, and the same is hereby overruled.

1305.

FRED A. WANN
vs.
UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the court that the petition for rehearing in this cause be, and the same is hereby overruled.

128 And afterwards, to wit: On the eleventh day of October, 1907, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

FRIDAY, *October* 11, 1907.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Peter S. Grosscup, Circuit Judge presiding. Hon. Francis E. Baker, Circuit Judge. Hon. William H. Seaman, Circuit Judge. Hon. Arthur L. Sanborn, District Judge. Edward M. Holloway, Clerk. Luman T. Hoy, Marshal.

Before Hon. Peter S. Grosscup, Circuit Judge. Hon. Francis E. Baker, Circuit Judge. Hon. William H. Seaman, Circuit Judge.

1303.

THE CHICAGO & ALTON RAILWAY COMPANY
vs.
UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Upon motion of counsel for Plaintiff-in-error, it is ordered that the mandate in this cause be and is hereby stayed until the further order of this court.

1304.

JOHN N. FAITHORN
vs.
UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

129 Upon motion of counsel for Plaintiff-in-Error, it is ordered that the mandate in this cause be and is hereby stayed until the further order of this court.

1305.

FRED A. WANN
vs.
UNITED STATES OF AMERICA.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Upon motion of counsel for Plaintiff-in-Error it is ordered that mandate in this cause be and is hereby stayed until the further order of this court.

POOR COPY

130 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 129, inclusive, contain a true copy of the transcript of the record, papers filed (except briefs of counsel) and proceedings had thereon in the United States Circuit Court of Appeals for the Seventh Circuit, in the cases of The Chicago & Alton Railway Company *vs.* United States of America John N. Faithorn *vs.* United States of America Fred A. Wann *vs.* United States of America, Nos. 1303, 1304 & 1305, October Term, 1906, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this eighteenth day of October A. D. 1907.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

131 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Chicago & Alton Railway Company is plaintiff in error, and The United States of America is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Northern District of Illinois, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby com-

132 mand you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of February, in the year of our Lord one thousand nine hundred and eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

133 [Endorsed:] File No. 20,960. Supreme Court of the United States. No. 557, October Term, 1907. The Chicago & Alton Railway Co. *vs.* The United States. Writ of Certiorari. Filed Feb. 10, 1908. Edward M. Holloway, clerk.

UNITED STATES OF AMERICA, *Seventh Circuit, ss:*

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full and true copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of The Chicago & Alton Railway Company, Plaintiff-in-error *vs.* The United States of America, is a full, true and complete transcript of the record upon which said cause was heard in the United States Circuit Court of Appeals for the Seventh Circuit, together with all proceedings in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this eleventh day of February, A. D. 1908.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

134 In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1303.

THE CHICAGO & ALTON RAILWAY COMPANY, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

It is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective attorneys, that the copy of the Tran-cript of the Record heretofore certified by the Clerk of the said United States Circuit Court of Appeals to the Supreme Court of the United States for use on the presentation to the Supreme Court of the United States of the petition for a Writ of Certiorari in the above entitled cause, and now on file in the office of the Clerk of the Supreme Court of the United States in cause No. 557, shall be taken and considered as the return of the Judges of the said United States Circuit Court of Appeals to the Writ of Certiorari granted by the Supreme Court of the United States, as certified under the hand and seal of the Clerk thereof, under date February 1st, A. D. 1908.

F. S. WINSTON AND
R. M. SHAW,
Attorney- for Chicago & Alton Railway Company.
CHARLES J. BONAPART,
Attorney General,
Attorney for the United States of America,
By EDWIN W. SIMS, *U. S. Attorney.*

Chicago, Illinois, February 3, 1908.

Endorsed: Filed Feb. 10, 1908. Edward M. Holloway, Clerk.

135 [Endorsed:] United States Circuit Court of Appeals for the Seventh Circuit.

136 [Endorsed:] File No. 20,960. Supreme Court U. S. October Term, 1907. Term No. 557. The Chicago & Alton Railroad Co. *vs.* The United States. Writ of Certiorari & Return. Filed Feb'y 13th, 1908.

137 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, Greeting:

Being informed that there is now pending before you a suit in which John N. Faithorn is plaintiff in error, and The United States of America is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Dis-

POOR COPY

trict Court of the United States for the Northern District of Illinois, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court
138 of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of February, in the year of our Lord one thousand nine hundred and eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

139 [Endorsed:] File No. 20,961. Supreme Court of the United States. No. 558, October Term, 1907. John N. Faithorn *vs.* The United States. Writ of Certiorari. Filed Feb. 10, 1908. Edward M. Holloway, clerk.

UNITED STATES OF AMERICA, *Seventh Circuit, ss:*

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full and true copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of John N. Faithorn, Plaintiff-in-error, *vs.* The United States of America, Defendant-in-error, is a full, true and complete transcript of the record upon which the cause was heard in the United States Circuit Court of Appeals for the Seventh Circuit, together with all proceedings in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this eleventh day of February, A. D. 1908.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

140 In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1304.

JOHN N. FAITHORN, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

It is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective attorneys, that the copy of the Transcript of Record heretofore certified by the Clerk of the United States Circuit Court of Appeals to the Supreme Court of the United States for use on the presentation to the Supreme Court of the United States of the petition for a Writ of Certiorari in the above entitled cause, and now on file in the office of the Clerk of the Supreme Court of the United States in cause No. 558, shall be taken and considered as the return of the Judges of the said United States Circuit Court of Appeals to the Writ of Certiorari granted by the Supreme Court of the United States, as certified under the hand and seal of the Clerk thereof, under date February 1st, A. D. 1908.

F. S. WINSTON AND
R. M. SHAW,
Attorney- for the Chicago & Alton Railway Company.
CHARLES J. BONAPART,
Attorney General,
Attorney for the United States of America,
By EDWIN W. SIMS, *U. S. Attorney.*

Chicago, Illinois, February 3, 1908.

Endorsed: Filed Feb. 10, 1908. Edward M. Holloway, Clerk.

141 [Endorsed:] United States Circuit Court of Appeals for the Seventh Circuit.

142 [Endorsed:] File No. 20,961. Supreme Court U. S. October Term, 1907. Term No. 558. John N. Faithorn *vs.* The United States. Writ of Certiorari & return. Filed Feb'y 13th, 1908.

143 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, Greeting:

Being informed that there is now pending before you a suit in which Fred A. Wann is plaintiff in error, and The United States of America is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Northern District of Illinois, and

we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the
144 United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of February, in the year of our Lord one thousand nine hundred and eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

145 [Endorsed:] File No. 20,962. Supreme Court of the United States. No. 559, October Term, 1907. Fred A. Wann *vs.* The United States. Writ of Certiorari. Filed Feb. 10, 1908. Edward M. Holloway, clerk.

UNITED STATES OF AMERICA, *Seventh Circuit, ss:*

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full and true copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of Fred A. Wann, Plaintiff-in-error, *vs.* The United States of America, Defendant-in-error, is a full, true and complete transcript of the record upon which said cause was heard in the United States Circuit Court of Appeals for the Seventh Circuit, together with all proceedings in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this eleventh day of February, A. D. 1908.

[Seal United States Circuit Court of Appeals,
Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

146 In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 1305.

FRED A. WANN, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

It is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective attorneys, that the copy

of the Transcript of Record heretofore certified by the Clerk of the United States Circuit Court of Appeals to the Supreme Court of the United States for use on the presentation to the Supreme Court of the United States of the petition for a Writ of Certiorari in the above entitled cause, and now on file in the office of the Clerk of the Supreme Court of the United States in cause No. 559, shall be taken and considered as the return of the Judges of the said United States Circuit Court of Appeals to the Writ of Certiorari granted by the Supreme Court of the United States, as certified under the hand and seal of the Clerk thereof, under date February 1st, A. D. 1908.

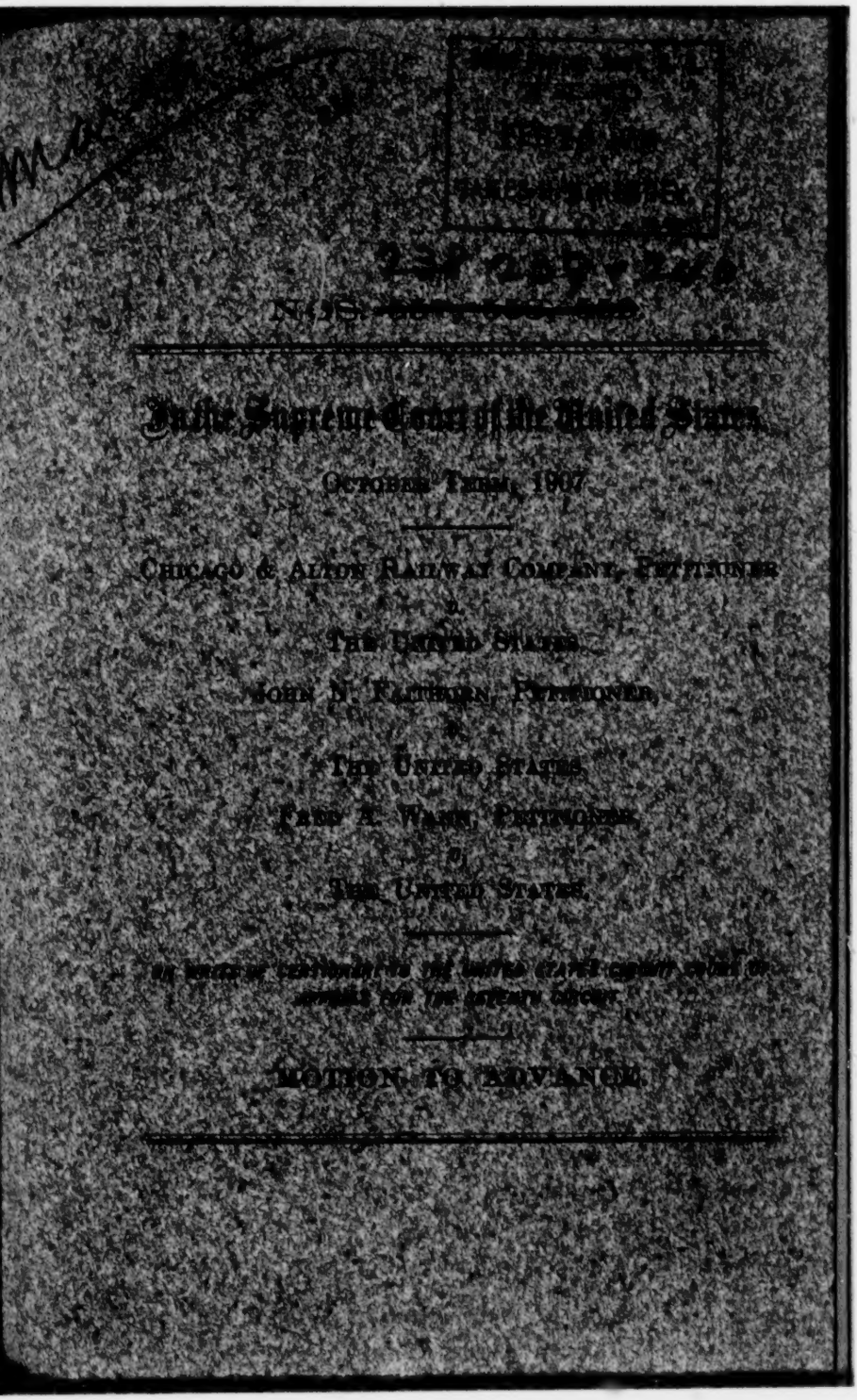
F. S. WINSTON AND
R. M. SHAW,
Attorney- for Chicago & Alton Railway Company.
CHARLES J. BONAPART,
Attorney General,
Attorney for the United States of America,
By EDWIN W. SIMS, *U. S. Attorney.*

Chicago, Illinois, February 3, 1908.

Endorsed: Filed Feb. 10, 1908. Edward M. Holloway, Clerk.

147 [Endorsed:] United States Circuit Court of Appeals for the Seventh Circuit.

148 [Endorsed:] File No. 20,962. Supreme Court U. S. October Term, 1907. Term No. 559. Fred A. Wann *vs.* The United States. Writ of Certiori & return. Filed Feb'y 13th, 1908.



In the Supreme Court of the United States.

OCTOBER TERM, 1907.

CHICAGO & ALTON RAILWAY COMPANY, PETITIONER

v.

THE UNITED STATES.

JOHN N. FAITHORN, PETITIONER,

v.

THE UNITED STATES.

FRED A. WARE, PETITIONER,

v.

THE UNITED STATES.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

CHICAGO & ALTON RAILWAY COMPANY, Petitioner, *v.* THE UNITED STATES.	No. 557.
JOHN N. FAITHORN, PETITIONER, *v.* THE UNITED STATES.	No. 558.
FRED A. WANN, PETITIONER, *v.* THE UNITED STATES.	No. 559.

MOTION TO ADVANCE.

Petitioners were convicted in the District Court of the United States for the Northern District of Illinois on July 6, 1906, for a violation of that part of section 1 of the Elkins Act which prohibits the giving of "any rebate * * * in respect of the transportation of any property in interstate or foreign commerce * * * whereby any such property shall by any device whatever be transported at a less rate than that published and filed." (32 Stat., 847.)

The indictment, which contained ten counts, charged the giving, etc., of rebates to the Schwarzschild & Sulzberger Company on two distinct ship-

ments of freight. The petitioners were found guilty of each offense and were sentenced to pay fines aggregating $60,000. The judgments were affirmed by the United States Circuit Court of Appeals for the Seventh Circuit and a petition for a rehearing denied. Thereupon, on January 20, 1908, petitioners submitted to this court a petition for writs of certiorari, which was granted on January 27.

The questions involved are of public importance; especially the principal question, whether the payment by a common carrier to a private corporation of a certain amount on each loaded car of freight transported by such common carrier in the manner and under the circumstances charged in the indictment constitutes the giving, etc., of a rebate in violation of the act.

The Solicitor-General, therefore, in accordance with rule 26, section 5, respectfully moves the court to advance the cases on the docket and set them down for hearing on a day convenient to the court, during the present term, if possible.

HENRY M. HOYT,
Solicitor-General.

FEBRUARY, 1908.

O

Office Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1907.

CHICAGO & ALTON RAILWAY COMPANY, Petitioner,
vs.
UNITED STATES OF AMERICA, Respondent.
No. 557. 238

JOHN N. FAITHORN, Petitioner,
vs.
UNITED STATES OF AMERICA, Respondent.
No. 558. 239

FRED A. WANN, Petitioner,
vs.
UNITED STATES OF AMERICA, Respondent.
No. 559. 240

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MR. F. S. WINSTON,
MR. R. M. SHAW,
Attorneys for Petitioners.

MR. ROBERT MATHER,
MR. JOHN BARTON PAYNE,
MR. S. H. STRAWN,
MR. BLACKBURN ESTERLINE,
Of Counsel.

GUNTHORP WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

CHICAGO & ALTON RAILWAY COMPANY,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

JOHN N. FAITHORN,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

FRED A. WANN,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Now come the Chicago & Alton Railway Company, John N. Faithorn and Fred. A. Wann, the above named petitioners, and each of them separately petitions this Honorable Court to grant a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, to remove therefrom to this Honorable Court for review the record and proceedings of the cases there pending, and numbered respectively 1303, 1304 and 1305, wherein said petitioners were in the respective cases mentioned, plaintiffs in error, and respondent was in each of the respective cases mentioned, defendant in error.

Said petitions are based on the ground that the questions raised by the record and proceedings in said causes and decided by the United States Circuit Court of Appeals are of gravity and great importance, not only to the parties in the case, but also to the public and the railroads and the shippers generally throughout the United States; and upon the further ground that there is great lack of uniformity, not only between the decisions of the court and of this court and the decisions of the Interstate Commerce Commission on the questions involved but also that there is great lack of uniformity between the judges of the particular court deciding the case, and that this lack of uniformity leaves the petitioners, the public and the railways and the shippers of the United States in great doubt and confusion touching the questions involved.

A copy of the record in each of the foregoing cases is presented herewith by your petitioners. The cases were tried together in the trial court and were all argued and tried together in the United States Circuit Court of Appeals. The records of the three cases are presented herewith for the convenience of the court bound together.

Thereupon your petitioners aver:

I.

THE INDICTMENTS AND THE CHRONOLOGY OF THE CASES.

On the 13th day of December, 1905, the grand jury sitting in the Eastern Division of the Northern District of Illinois returned an indictment consisting of ten counts against the Chicago & Alton Railway Com-

pany, John N. Faithorn and Fred A. Wann. Each of the first eight counts of the indictment charged the defendants with a violation of the provisions of the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce" and of the acts amendatory thereof. In each of said counts the defendants were charged with either "offering to give," or "granting," or "giving"

> to the Schwarzschild & Sulzberger Company certain *rebates* of the freight rates and charges therefore by it (the said Chicago & Alton Railway Company) * * * collected, whereby the said property (being the property specified in the indictment) would be * * * transported in the said interstate commerce at less compensation and rates than those named therefor in the said tariffs and schedules, that is to say, a *rebate* of one dollar for each of said carloads.

There were two distinct shipments of freight specified in the first eight counts, and the offense of rebating with reference to each shipment was charged in four different ways. The gist, however, of each offense was that the defendants had given a *rebate* to the Schwarzschild & Sulzberger Company of one dollar per car.

As to the last two counts, before the close of the trial in the trial court a verdict of not guilty was rendered, and for the purposes of this petition they need no further consideration.

To the indictment as returned by the grand jury, each of the defendants entered pleas of not guilty, and the cases subsequently came on for trial before his Honor Judge Landis and a jury. The jury found the defendants guilty on the first eight counts, and the court

thereupon fined the petitioner Chicago & Alton Railway Company $20,000 for each offense and the petitioners Faithorn and Wann $5,000 each for each offense, making the total aggregate of the fines $60,000, and judgment was entered upon the fines so imposed. From this judgment the three petitioners filed their separate writs of error from the United States Circuit Court of Appeals, which were allowed, and upon the filing of their respective bonds, it was ordered that they operate as a supersedeas staying the execution of the judgments in the court below. The three petitioners subsequently filed their respective separate assignments of error.

The cases having been argued, the Court of Appeals on the 16th day of April, 1907 (Rec., 86), entered an order affirming the judgment of the court below. In affirming the case, as will hereafter more specifically appear, the judges of the Court of Appeals were hopelessly divided. The major premise assumed by their Honors, Judge Baker and Judge Seaman, to be correct, was diametrically opposed to the law as assumed by his Honor, Judge Grosscup, and the course of reasoning which the differing judges adopted was equally contradictory.

The petitioners, within a reasonable time thereafter, to-wit, on the first day of May, 1907, filed their petition for a rehearing. This petition for a rehearing the court took under advisement and finally denied on the 9th day of October, 1907. To review this decision the petitioners now come here.

II.

THE FACTS.

In the trial court there was no dispute as to certain facts which were agreed to by written stipulation. There was, however, a controversy as to the admissibility of certain evidence which was ruled out and to which reference will be made again. The agreed facts are as follows:

John N. Faithorn, one of the plaintiffs in error, was at the time of the offenses alleged in the indictment the vice president of the plaintiff in error, the Chicago & Alton Railway Company, and Fred A. Wann was its general freight agent. The Chicago & Alton Railway Company was an Illinois corporation engaged in interstate commerce, and by means of its own rails, and its connections, in carrying goods from Kansas City, Kansas, to the various points mentioned in the indictment, and did in fact actually receive at Kansas City for transportation, from the Schwarzschild & Sulzberger Company the specific freight mentioned in the tables contained in the first and fifth counts of the indictment.

At the time complained of in the indictment, there was in existence at Kansas City, Missouri, and Kansas City, Kansas, another corporation known as the Kansas City Belt Railway Company, ordinarily called the "Belt Line," which was engaged in the business of switching cars and freight from the various industries along its line to the rails of the trunk lines in Kansas City over which such freight was to be transported to its ultimate destination. Among other industries so

served by it was the industry owned and controlled by the Schwarzschild & Sulzberger Company, a corporation organized under the laws of the State of New York, and having a packing house plant in the City of Kansas City, Kansas. All of the freight mentioned in the first and fifth counts of the indictment was received by the Belt Line from the Schwarzschild & Sulzberger Company, and switched by the Belt Line to the tracks of the Chicago & Alton Railway Company. The Belt Line at the time specified in the indictment had filed with the Interstate Commerce Commission a published tariff showing that it made a charge of $3.00 a car for every car switched by it to the Chicago & Alton Railway Company, and this tariff was in effect at the time of the offenses alleged in the indictment. By agreement between the Belt Line and the Alton Company this $3.00 switching charge was absorbed by the Chicago & Alton Railway Company.

It was further shown in the stipulation of facts that many years prior to the first day of January, 1901, the Schwarzschild & Sulzberger Company had constructed at its own expense, and had maintained from year to year thereafter, a large amount of railroad track and switches, aggregating in all about a mile and a half in length.

(A plat of the plant of the Schwarzschild & Sulzberger Company and the railroad track and switches was attached to the stipulation as Exhibit B, and a copy of it will be found on page 42 of the transcript.)

These tracks and switches were all located upon the property of the Schwarzschild & Sulzberger Company, and connected the loading docks of that company with

the tracks of the Belt Line. They were used for the purpose of hauling freight into the plant and out from the plant, and also for switching purposes generally within the plant. (Rec., 39.) The initial cost of the construction of these railroad tracks and switches amounted to the sum of $75,000 (Trans., 38) and the taxes and maintenance charges each year, exclusive of interest on the investment, amounted to the sum of $1,200 per year.

For many years prior to the first day of January, 1901, the switching tariff of the Belt Line for switching cars from the plant of the Schwarzschild & Sulzberger Company to the tracks of Alton Company was $4.00 a car. But as the Belt Line could not reach the buildings and loading docks of the Schwarzschild & Sulzberger Company without using the tracks and switches constructed and maintained at the expense of the Schwarzschild & Sulzberger Company, it paid to the Schwarzschild & Sulzberger Company, under an agreement between it and that company, out of the $4.00 per car received by it, $1.00 per car for all loaded cars switched by it from the plant of the Schwarzschild & Sulzberger Company. No charge or payment was made for empties or incoming cars. During all of these years prior to the first day of January, 1901, the Chicago & Alton Company had absorbed this switching charge of the Belt Line of $4.00 a car by paying to the Belt Line the sum of $4.00 per car, and the Belt Line in turn paid to the Schwarzschild & Sulzberger Company the $1.00 per car.

On or about the first day of January, 1901, the Schwarzschild & Sulzberger Company requested the

Chicago & Alton Company to pay to it direct instead of through the medium of the Belt Line the said $1.00 per car for loaded cars hauled by the Chicago & Alton Railway Company for the Schwarzschild & Sulzberger Company, and the Chicago & Alton Railway Company "agreed with the Schwarzschild & Sulzberger Company to thereafter send to the said Schwarzschild & Sulzberger Company said $1.00 per car instead of sending the same to the Belt Line, for the use of the Schwarzschild & Sulzberger Company." (Trans., 38, 39.)

On January 1, 1901, the Belt Line changed its published switching charge from $4.00 to $3.00 per car, and after the said first day of January, 1901, the Chicago & Alton Railway Company paid and continued to pay to the Schwarzschild & Sulzberger Company the sum of $1.00 per car, and also thereafter paid to the Belt Line the sum of $3.00 per car, instead of $4.00 as formerly.

The $1.00 per car so paid by the Alton Company, was paid under the direction of its officers, Mr. Wann and Mr. Faithorn, in accordance with and pursuant to the agreement to that effect made about January, 1901, and attached to the stipulation will be found copies of the vouchers which were used by the officers in making the payments aforesaid. (Trans., 34, 40, 41, 42.) They show clearly on their face just what the transaction was.

It was further agreed in the stipulation that the Schwarzschild & Sulzberger Company (Trans., 33) was not a railroad corporation and had filed no tariffs, rates or agreements with the Interstate Commerce Commis-

sion, at any time prior to the time of the shipments mentioned in the indictment; but it was also agreed that the Schwarzschild & Sulzberger Company had the lawful right to construct the railroad tracks and switches in question upon its own property and to maintain the same.

The agreement also showed that the schedules required by the "Interstate Commerce Act" to be kept by the carriers did not state separately or otherwise any charges whatever for or on account of the "trackage" paid to the Schwarzschild & Sulzberger Company.

The stipulation after having set up the facts respecting the physical situation of the tracks of the Schwarzschild & Sulzberger Company, the Belt Line and the Alton Company, and the arrangement made with respect to the use thereof and the payment therefor, also showed that the Chicago & Alton Company only carried 32 6/10 per cent. of the entire output of the Schwarzschild & Sulzberger Company; that the Great Western Company carried 15 per cent. of it, and that other competing lines carried 31 4/10 per cent., the balance being carried by non-competing lines. The total number of loaded cars switched out of the plant of the Schwarzschild & Sulzberger Company from January 1, 1901, to February 1, 1904, inclusive, was about 19,000 cars. (Trans., 39.)

Upon the theory that the Schwarzschild & Sulzberger Company were charging and receiving $1.00 per car for all loaded cars out and no charge for incoming cars, this would have given the Schwarzschild & Sulzberger Company a total revenue during the period of three years and one month of $19,814, or an annual in-

come, in round numbers, of $6,000 on an investment of $75,000, upon which there were annual charges for maintenance and taxation of $1,200. In other words, the net revenue which the Schwarzschild & Sulzberger Company received for the use of its tracks was a small fraction more than 6 per cent. upon the cost of its investment.

The stipulation further provided that subject to the ruling of the court as to its competency, the defendants should be permitted to introduce evidence on the trial tending to prove what, if any, charge would have been a reasonable charge during the period covered by the indictment for the Schwarzschild & Sulzberger Company to have made for the use of the tracks furnished and maintained by them as aforesaid.

The stipulation having been introduced in evidence by the District Attorney, the Government rested; and thereupon the defendants severally and jointly moved to exclude all of the evidence from the consideration of the jury, and for a peremptory instruction directing the jury to find them each not guilty. This motion the court denied, and the defendants duly excepted.

The court, in effect, held that any sum paid by a carrier to a shipper out of the rate is a rebate, regardless of whether the sum so paid by the carrier to the shipper was for debt due and owing to the shipper or was reasonable compensation for a service rendered or instrumentality furnished by the shipper for which the shipper was lawfully entitled to receive compensation.

This ruling having been made, the defendants then produced six witnesses, experts on the subject, who

were present in the court room, prepared, ready and willing to testify under oath that the $1.00 per car referred to in the eight counts of the indictment was less than the *fair and reasonable value of the trackage* furnished by the Schwarzschild & Sulzberger Company, and was *less* than *reasonable* compensation for the use of the tracks so furnished and maintained by them. The court, however, refused to permit all or any part of this evidence to go to the jury, but sustained an objection of the District Attorney thereto; to which ruling of the court, the defendants, and each of them, duly excepted. (Trans., 45, 46.)

Thereupon the defendants rested their case and the court instructed the jury to find the defendants guilty.

III.

THE COURT OF APPEALS ERRONEOUSLY DECIDED QUESTIONS OF GRAVITY AND GREAT PUBLIC IMPORTANCE ARISING UNDER THE ACTS TO REGULATE COMMERCE, AND THERE IS A DIVERGENCE OF OPINION NOT ONLY BETWEEN THE JUDGES OF THE COURT BUT ALSO BETWEEN THE CIRCUIT COURT OF APPEALS AND THIS COURT AND THE INTERSTATE COMMERCE COMMISSION ON THE QUESTIONS DECIDED.

First. The Court of Appeals erroneously decided a question of gravity and great public importance when it decided that a common carrier could not, for a reasonable compensation, acquire the right to use and operate an industrial track.

The Court of Appeals and as well the trial court, in the decision of this case, considered and construed both the original interstate commerce act known as the Cullom act, and also the amendment thereto

otherwise known as the Elkins act, and also the amendment thereto otherwise known as the Hepburn act. The majority opinion of the Court of Appeals decided that a common carrier can not acquire, in any way whatsoever, either by lease, purchase, condemnation or otherwise, an industrial track leading from its right of way into one or more private industries. (Rec., 89.)

On the other hand, the minority opinion, though concurring in the conclusion reached, held that a common carrier could acquire such an industrial track.

The majority opinion held that the acquisition of such an industrial track was *ultra vires* a carrier company and that any sum which it might pay for the purpose of acquiring such a track, if paid to a person who might then or thereafter be interested in freight moving over such a track, would be a rebate *regardless* of whether or not the sum so paid was *reasonable* compensation for the property acquired or not.

On the other hand, the concurring opinion held that a reasonable sum could be paid for the acquisition of such railroad track.

Aside from the great divergence of opinion between the judges in the particular court, the proposition of law announced by the majority opinion is of far reaching importance. For the purpose of preparing a petition for the rehearing in the Court of Appeals in these cases, inquiry was made of the interstate carrier companies whose records in Chicago were easily accessible, as to the facts respecting the acquisition or use by such companies of switch tracks leading from their right of way to one or more private industries.

The president of one large system terminating in Chicago is authority for the statement that it would be conservative for him to say that there are more than one thousand industrial tracks along the line of his road, the ownership of which, or the right to use which, has been acquired by his company either by lease, purchase or on a wheelage basis.

The president of another large company has said to us that the right to use every switch track along the line of his system, more than 8,000 miles in length, has been acquired either by lease, purchase or on a wheelage basis and is now in operation under one of these arrangements.

The general counsel of another railroad company, in an opinion to the president of his own company, after stating that every switch track leading from its right of way into industrial plants, had been acquired either by lease, purchase or on a wheelage basis, said:

> "If railroad companies are not permitted to operate these switch tracks they must cease to do so entirely and the tracks which are now owned or operated by the railroad companies must be sold to manufacturing companies or torn up. The penalties imposed for a violation of the law in this regard are such that they can not be ignored."

The general counsel of another belt line in Chicago states that his company has acquired either by lease, purchase or on a wheelage basis every switch track along the line of his road, and that there are others now being constructed, the right to use which will be acquired by his company, unless of course this Honorable Court should prevent such acquisition by affirming the decision of the Court of Appeals. Substantially

the same thing is said by all the other companies. It thus appears that when the Court of Appeals decided that carrier companies could not acquire the ownership of or the right to use industrial tracks leading to industrial plants and could not pay reasonable compensation therefor they enunciated a theory of law which, if carried to a logical conclusion, will inflict a most serious blow upon the commercial and shipping interests of this country and will cause a complete revolution in the present methods of doing business.

Since the United States Circuit Court of Appeals denied the petition for rehearing in the case at bar, the Interstate Commerce Commission has handed down a decision which stamps with approval the very transaction for which the petitioners here have been indicted and found guilty.

In *Welcetka Light & Water Company* v. *The Fort Smith and Southwestern Railroad Company*, decided by the Commission on November 4, 1907, the Interstate Commerce Commission, speaking of the acquisition by carrier companies of industrial tracks leading from the railway of the carrier companies to an industrial plant, said:

> "Although the payments to be made by the carrier to the shipper under such contracts (being contracts for the acquisition of the track) may properly be determined or based on the number of carload shipments made to or from the industry, such payment ought not to be out of the rate as each car is moved but ought to be made out of available funds at the end of definite intervals, say of six months or a year."

The Commission in this case expressly recognized the right of carrier to do what the Court of Appeals in this

case held was a crime. The Commission not only recognizes the right of the carrier to acquire such tracks, but also recognizes that such tracks may be paid for on a per car basis. In the case at bar the defendant company did not actually acquire the ownership of the track but merely paid for the use thereof to the shipper a sum which was equivalent to the annual interest on the cost of the investment,—a distinction without a difference.

The question therefore remains of grave public importance, shall the acquisition and the use of such industrial tracks be discontinued because of the majority opinion of the Circuit Court of Appeals in the case at bar, or shall the carrier continue to use them and acquire the right to use them under the decision of the Interstate Commerce Commission? Which is right and which is wrong? The petitioners respectfully submit that under the circumstances a question is presented to this court which, in view of the vast interests involved justifies its prompt consideration.

Second. The Court of Appeals erroneously decided that industrial tracks and switches are not a part of the highways of commerce and, pro tanto, equivalent to an equal amount of railroad terminals.

Industrial tracks leading into large industrial plants, are in the nature of terminal facilities. Here trains are broken up and made up, cars are repaired and all switching and other work in connection therewith is performed. Industrial tracks and switches of this kind are in general use over the United States and the carrier companies acquire the right to use the same either by lease or purchase or on a wheelage basis. If the carrier companies may

not lawfully and for reasonable compensation acquire the ownership of or the right to use such tracks, the burden will be imposed upon the carrier companies of acquiring terminal facilities elsewhere for the purpose of performing the work which has heretofore been done over, upon and across these industrial tracks. The amount of new capital which may be required for the purpose of acquiring these new terminal facilities is so enormous as to be almost staggering. To reorganize and reconstruct the Stock Yards District in Chicago alone, so as to harmonize with the requirements of the decision of the Court of Appeals will practically bankrupt the railroads and industries located there.

Third. The Court of Appeals erroneously decided that property does not become property in transit in interstate commerce the instant the carrier accepts it for delivery in a foreign state and begins to move it.

The majority opinion holds that switch tracks and industrial tracks leading from the rights of way of carrier companies to the loading platforms and docks of large industrial concerns are *not* railroad track, in fact that they are not facilities furnished by the shipper within the meaning of paragraph 15 of the Hepburn act but are more akin to trolleys and private roadway and that any sum paid for the use of such facilities is a rebate, be it ever so reasonable.

The minority opinion holds that such railroad track constitutes a part of the highways of commerce and that a reasonable sum can be paid for its use when it is furnished by the shippers.

If such railroad track and switches are, in law and in fact, not "railroad track," in the technical sense of the phrase, but are in fact and in law "plant facilities," then property in transit, even though delivered to a carrier, with a bill of lading issued and outstanding from the carrier, and attached to one of the carrier's engines and in process of movement by such engine, is not in fact "property in interstate commerce" so long as it remains on the switch track leading to the main line.

On the other hand, if the minority opinion be correct, it is "property in interstate commerce" *eo instante* when the carrier attaches its engine to the freight car and accepts the freight. Thus upon the important question as to when property becomes property in transit in interstate commerce, the court is hopelessly divided, one part of the court holding that it does not become property in interstate commerce until it reaches the main line, the other part of the court holding that it becomes property in interstate commerce at the time when it is received by the carrier company. The majority opinion is in conflict with the decisions of this court in *Kidd* v. *Pearson*, 128 U. S., 1, and *Coe* v. *Errol*, 116 U. S., 517.

One thing is quite clear, so far as the carrier is concerned, that whether it be regarded as "railroad track" or "plant facilities," if the property were damaged by the negligence of the carrier while in transit from the loading docks to the main line, there is no question but that the carrier would in law be liable for the loss. It would also seem quite clear that for the purposes of prosecution under the "meat inspec-

tion'' act and the safety appliance law, the carrier would be liable. All of these points will be discussed more fully in the brief filed in connection herewith.

Fourth. The Court of Appeals decided that if a rate is paid in money or money's worth, it can never be a rebate; but in this respect it is in direct conflict with the holdings of the Interstate Commerce Commission.

The majority opinion holds that if the full rate is paid, either in money or in money's worth, the parties can not be guilty of rebating. While we believe this to be the law, it is in direct conflict with the rulings of the Interstate Commerce Commission.

> *Ruling* 54, *Administrative Rulings and Opinions of the Commission, published June 3rd,* 1907.

Notwithstanding the decision of the Court of Appeals on this point, the Interstate Commerce Commission still adheres to its original opinion and the result is that there is the utmost confusion in the minds both of the traveling and shipping public, as to the correct interpretation of the law. This interpretation by the Commission has been the cause of endless confusion and argument to the entire railroad world and if the expression of the Court of Appeals upon this point is correct it is an opinion which the shipping public is entitled to have determined once and for all by the court of last resort.

Fifth. The Court of Appeals erroneously decided that a carrier company organized under the laws of the State of Kansas may not acquire property in Kansas in accordance with the provisions of the laws of that state.

The decision by the majority opinion that a carrier company can not acquire by lease, contract or otherwise an industrial track is a direct blow at property rights and also to the right of the state to control the powers of the corporations which it creates, with respect to the acquisition of property within its own limits. The particular track in question was in Kansas. Under the statutes of Kansas a carrier company could acquire such an industrial track.

Section 1341 *of the general statutes of Kansas.*

Section 1382 *of the general statutes of Kansas.*

Section 6468 *of the general statutes of Kansas.*

Sixth. There is a divergence of opinion between the Interstate Commerce Commission and the minority opinion of the Court of Appeals on the question whether the point "Kansas City" is limited to the tracks, switches and sidings of the Alton Company, or whether it extends beyond and includes the tracks, switches and sidings of other companies at Kansas City within the meaning of the published tariffs.

The majority of the court did not discuss this question at all. But the minority opinion, which was a "concurring" opinion, held that a published rate included all costs and charges which it was necessary for the carrier to make, in order to get freight from any

point in Kansas City not on its own rails to its own rails. The language is:

> "The published rate is not affected by the fact that the cars were loaded at the S. & S. Company's warehouses, and not on the Company's rails—such place of loading being, along with the Railroad Company's freight stations, 'Kansas City' within the meaning of the published rates."

This interpretation of the act by the Honorable Judge Grosscup is in direct conflict with the views held by the Commission on this subject in the following cases decided on November 4th, 1907:

J. H. Leonard v. *C. M. & St. P. Ry. Co.*, No. 1078.

Arkansas Fuel Company v. *Same*, 1184.

Lanning-Harris Coal & Grain Co. v. *Same*, No. 1075.

Star Coal Company v. *Same*, No. 1211.

Mayer Coal Company v. *Same*, No. 1220.

Gray-Bryan Coal Co. v. *Same*, No. 1222.

Lanning-Harris Coal & Grain Co. v. *A. T. & S. F. Ry. Co.*, No. 1073, and

Lanning-Harris Coal & Grain Co. v. *A. T. & S. F. Ry. Co.*, No. 1074.

Seventh. The Court of Appeals erroneously decided that a shipper is not entitled to receive reasonable compensation for services or facilities rendered by him in connection with the transportation of freight.

The cardinal principle underlying the interpretation given by the Commission to the old interstate commerce act as it existed prior to the passage of the Hepburn act, was that a shipper was entitled to receive

reasonable compensation for such services or facilities as it directly or indirectly rendered in connection with the transportation of the freight.

See "In the Matter of Division of Joint Rates and other Allowances to Terminal Railroad Companies," 10 I. C. R., 385 (404).

This interpretation of the Commission of the old act was incorporated into Section 15 of the Hepburn act. The whole theory of the law as interpreted by the Commission prior to the passage of the Hepburn act, and the whole theory of the Hepburn act, is that if a shipper renders any services or furnishes any facility in connection with the transportation of the freight he is entitled to receive reasonable compensation therefor. The majority opinion of the court holds that the question of reasonableness has nothing whatever to do with the case, while on the other hand the concurring opinion holds that the sum, if reasonable, can be paid, if paid through the operating department, but is a criminal offense if paid through the traffic department. These conclusions are so divergent and so inconsistent that serious confusion results.

CONCLUSION.

Aside and apart from the guilt or innocence of the particular petitioners here it is quite evident that there are presented by this case questions of great public importance. The petitioners respectfully suggest to the court that they are questions of such moment not only to them as the accused in this case but also to them as railroad men and to other railroad men and ship-

pers and to the business interests of the country generally that it is a case in which they would be derelict both to the duty which they owe to themselves and also to the public if they did not unite in asking for a decision from the court of last resort. The divergence of opinion between the judges of the Court of Appeals leaves many of these questions in doubt and the divergence of opinion between the Court of Appeals and of the Interstate Commerce Commission and of this court leave other of these questions in doubt. If there is any doubt at all touching any of these questions, the interests of the industrial world as well as of the petitioners requires that they should be dispelled as speedily as possible by this court; for all of which reasons the petitioners respectfully submit that their petition for a writ of certiorari should be granted.

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In the Supreme Court of the United States.

OCTOBER TERM, 1907.

CHICAGO & ALTON RAILWAY COMPANY, PETITIONER,

v.

THE UNITED STATES.

JOHN N. FAITHORN, PETITIONER,

v.

THE UNITED STATES.

FRED A. WARE, PETITIONER,

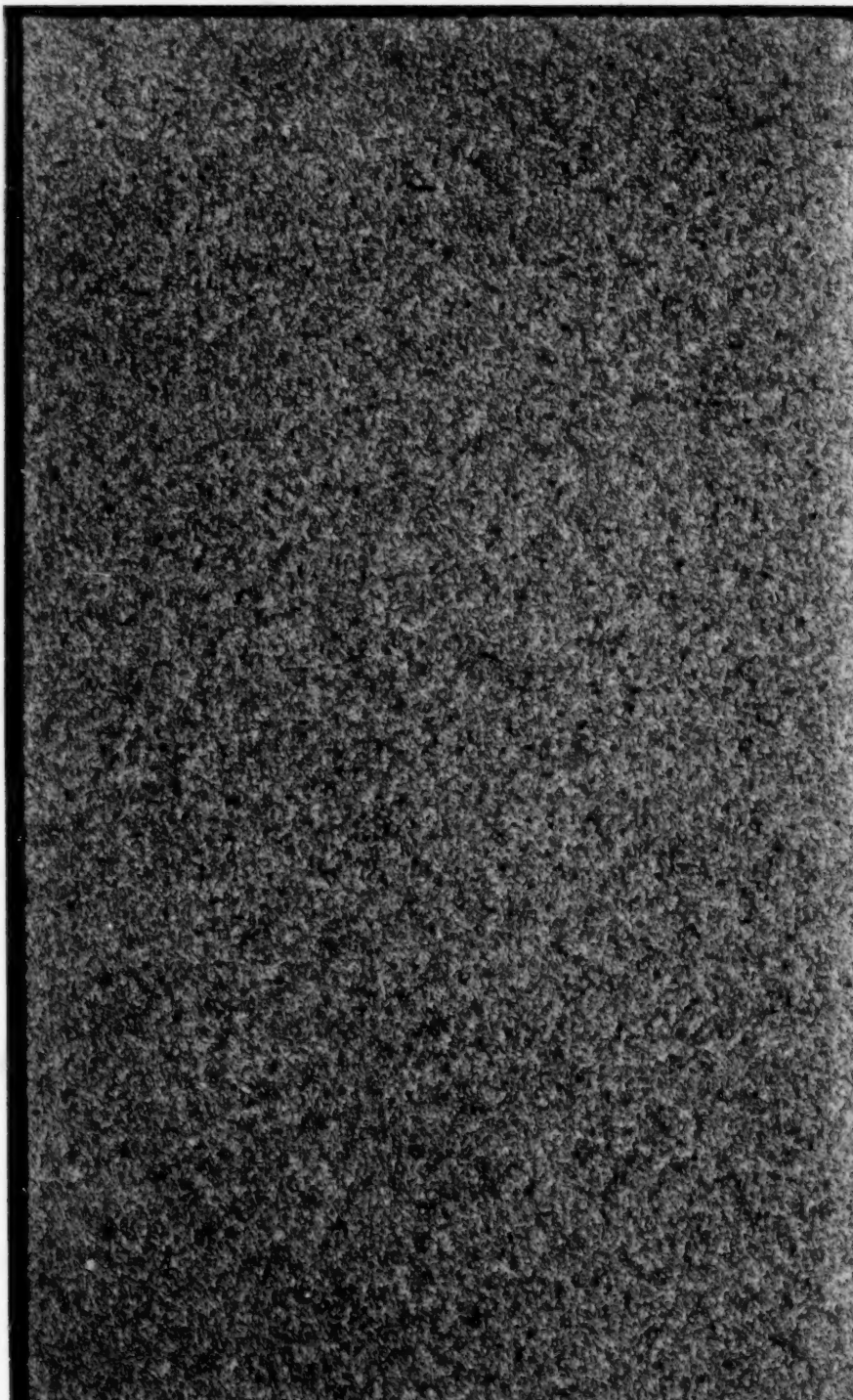
v.

THE UNITED STATES.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [illegible] CIRCUIT.

GOVERNMENT'S BRIEF IN OPPOSITION.

[illegible]



In the Supreme Court of the United States.

OCTOBER TERM, 1907.

CHICAGO & ALTON RAILWAY COMPANY, PETITIONER, v. THE UNITED STATES.	No. 557.
JOHN N. FAITHORN, PETITIONER, v. THE UNITED STATES.	No. 558.
FRED A. WANN, PETITIONER, v. THE UNITED STATES.	No. 559.

GOVERNMENT'S BRIEF IN OPPOSITION.

The petitioners herein were convicted of violating that part of section 1 of the Elkins Act which prohibits the giving of "any rebate * * * in respect of the transportation of any property in interstate or foreign commerce * * * whereby any such property shall by any device whatever be transported at a less rate than that published and filed." (U. S. Comp. St., Supp. 1905, p. 599; 32 Stat., 847.)

The facts in this case are succinctly stated in the opinion of the Circuit Court of Appeals by Judge Baker, as follows:

> The Government proved that the Chicago & Alton was an interstate common carrier,

having a line extending eastward from Kansas City, Mo.; that the Kansas City Railway Company was an interstate common carrier between Kansas City, Kans., and Kansas City, Mo., having a belt line over which it hauled cars of freight from industries along its tracks to various railroads; that the Schwarzschild & Sulzberger Company, a corporation, owned and operated a meat-packing plant at Kansas City, Kans., adjoining the tracks of the Belt Line; that the S. & S. Co. was not a common carrier; that within its plant, and running around and between various buildings thereof, the S. & S. Co., at a cost of $75,000, built about a mile and a half of tracks, switches, and sidings, on which the annual outlay for maintenance and taxes was $1,200; that the S. & S. tracks connected with the Belt Line tracks at the property line; that the Alton had arrangements with the Belt Line and with eastern railroads whereby the Alton undertook to transport property in interstate commerce from Kansas City, Kans., to seaboard cities; that the Alton published and filed schedules of rates for such transportation; that the Belt Line published and filed a rate of $3 a car for hauling cars of freight over its line from the S. & S. plant to the Alton; that the Alton transported various carloads of freight for the S. & S. Co. from Kansas City, Kans., to eastern points, collected from the S. & S. Co. the full amount of the published rates, and paid to the Belt Line $3 a car, which amount was included in the Alton's published rates; and that the Alton, through plaintiffs

in error Faithorn as vice-president and Wann as general freight agent, paid back to the S. & S. Co., under book entries of "refund of terminal charges," $1 on each car (for the use made of the S. & S. tracks in getting the S. & S. Co.'s cars of freight out upon the Belt Line's tracks).

At the conclusion of the Government's evidence plaintiffs in error moved that the jury be directed to return a verdict of not guilty. This motion was overruled. Thereupon plaintiffs in error offered to prove that the use of the S. & S. tracks was reasonably worth $1 a car. The court excluded the proffered evidence. (156 Fed. Rep., 558, 559.)

(We call attention to the language inclosed in parentheses in Judge Baker's statement of facts, for the reason that we can find no word or sentence in the stipulation of facts which would justify the inference or statement *that the $1 per car was paid for the use made of the S. & S. Co.'s tracks.*)

Upon these facts the Circuit Court of Appeals held in substance that the jury was warranted in finding that the lease of these plant facilities was a device whereby the property of the S. & S. Company was transported at $19 a car, while other shippers were compelled to pay $20 per car. It was also held by the Circuit Court of Appeals that the case was ruled in principle by the decision in *Wight* v. *United States* (167 U. S., 512).

The opinion in this case was rendered at the January session, 1907, and on a petition for a rehearing

filed at the October term, 1907, the Circuit Court of Appeals said:

> *Per curiam:* The burden of the argument in support of the petition is that the opinion of the court promulgates the doctrine that it is unlawful "for a railroad company to acquire by lease or purchase or other contract the ownership or the right to use a track leading from its right of way to an industrial plant." The facts of the case do not require the affirmance of such a proposition; and we disclaim the inference which counsel draw from the language of the opinion. We do not elaborate because we believe that counsel on reading the opinion anew will have no difficulty in understanding that our judgment of the character of the Alton's dominion over the S. & S. tracks was founded on our view that the evidence warranted the jury in finding that "the tracks were S. & S. plant facilities and not instrumentalities for the Alton's use in discharging its duties to the public."
>
> The petition is overruled.

The Government opposes the granting of a writ of certiorari in these cases for the following reasons:

I.

The trial court and jury were bound to consider only such evidence as was contained in the agreed statement of facts. There is nothing in that statement which indicates that the $1 per car which was refunded by the Alton road to the S. & S. Co. was repaid *as and for a rental for the use of* the S. & S. Co.'s tracks.

Much has been said in the opinion of the Circuit Court of Appeals and in the briefs of counsel with

respect to the right of the Alton road *to lease* the tracks and switches upon the property of the S. & S. Co., and *to pay for the use* thereof. This arrangement between the Alton road and the S. & S. Co. for the refund of $1 per car has been repeatedly characterized as *a contract or lease for the use* by the Alton road of the tracks and terminal facilities upon the property of the S. & S. Co. It is worthy of note that *in the stipulation of facts* this arrangement is not characterized as a lease or even as a contract for the use of the tracks. The stipulation of facts with respect to this matter is as follows:

> That on or about the first day of January, 1901, the said Schwarzschild and Sulzberger Company requested the said The Chicago and Alton Railway Company to pay to it direct, instead of through the medium of the Belt Line, the said sum of one dollar ($1.00) per car, for all loaded cars hauled by the said The Chicago and Alton Railway Company for the Schwarzschild and Sulzberger Company, and thereafter the said The Chicago and Alton Railway Company discontinued mailing to the Belt Line the one dollar ($1.00) per car for the Schwarzschild and Sulzberger Company, and the said The Chicago and Alton Railway Company, by F. A. Wann, below mentioned, agreed with the said Schwarzschild and Sulzberger Company to thereafter mail said one dollar per car to the said Schwarzschild and Sulzberger Company direct, instead of to the Belt Line for the use of the said Schwarzschild and Sulzberger

> Company; that thereafter the said The Chicago and Alton Railway Company did send to the Belt Line the sum of three dollars per car, for all cars switched by it to the Chicago and Alton tracks, and to the Schwarzschild and Sulzberger Company the sum of one dollar per car, for each car switched from the said plant of the Schwarzschild and Sulzberger Company. (Rec. Cir. Ct. of Appeals, p. 31.)

It will be observed that the Alton road paid to the S. & S. Co. *at their request* the sum of $1 per car *for all loaded cars hauled by the railway company for the S. & S. Co.* Nothing is said in the stipulation that this $1 per car was paid by the Alton road to the S. & S. Co. *for the use of its tracks.* It is true that counsel for the railway company has chosen to construe this arrangement as a contract whereby the S. & S. Co. was to receive compensation from the Alton road *for the use* of these plant facilities. On the other hand, the trial court and jury evidently took the view that this arrangement, as above described in the stipulation of facts, was not a contract or lease *for the use* of the tracks on the property of the S. & S. Co., but was just that which the language clearly indicates, *a payment at the request of the S. & S. Co. of $1 per car on each loaded car transported by the Alton Railway Company for the S. & S. Co.*

The stipulation of facts (Rec. Cir. Ct. of Appeals, p. 34) reserved to the defendants, and each of them, the right to introduce evidence, if it should be held competent by the court, proving or tending to prove

the exact agreement which was made on or about the 1st day of January, 1901, by and between the S. & S. Co. and the Chicago and Alton Railway Company, as the result of which the said railway company thereafter *paid to the S. & S. Co. direct $1 per car for all loaded cars hauled by the said railway company for the S. & S. Co.* It does not appear, however, that the defendants, or any of them, attempted to avail themselves of *such right* upon the trial of this case. They were apparently content to leave *the arrangement or contract* by which this $1 per car was paid to the S. & S. Co. to be understood by the trial court and jury as the same is described on page 31 of the record, as above quoted. The defendants did, however, upon the trial offer to prove by six witnesses (Rec. Cir. Ct. of Appeals, p. 45) that a charge of $1 per car *was less than the fair and reasonable value of the trackage furnished by the S. & S. Co.* In the absence of any evidence going to show that the Alton road was paying the S. & S. Co. $1 per car *for the use* of the trackage on the property of the S. & S. Co., it was certainly incompetent and irrelevant to receive proof as to the reasonable value of such trackage facilities.

The stipulation (Rec. Cir. Ct. of Appeals, pp. 25–35, inclusive) contains no statement of fact so far as we are able to ascertain from which the jury could have reached the conclusion that the Alton road had entered into a contract with the S. & S. Co. to pay to that company a rental *for the use* of its tracks, and such was not the fact. That por-

tion of the stipulation hereinbefore quoted fully states the facts in the case, namely, that the Alton road agreed to and did from time to time *pay* to the S. & S. Co. at its request *$1 per car for all loaded cars hauled by the Alton road for the S. & S. Co.* There was no thought or suggestion at the time such arrangement was entered into that such money was to be refunded to the S. & S. Co. *as a rental for the use of its trackage.* Nor was there any attempt made upon the trial of this case to establish such fact, for the simple reason that no witnesses could have been called who would have so testified.

II.

***Conceding for the purpose of the argument* that there was evidence tending to show that the $1 per car was paid by the Alton road to the S. & S. Co. *for the use of its tracks*, nevertheless the jury was warranted in finding the defendants guilty of the offense of rebating if they believed from the evidence that such contract or arrangement was a mere device, and that the real transaction was in truth and in fact the payment of a rebate.**

The Circuit Court of Appeals in deciding this case held that the lease of these plant facilities was a mere device whereby the property of the S. & S. Co. was transported at $19 per car, while other shippers were paying $20 per car, and upon the rehearing, all the circuit judges concurring, the court said that in its judgment the character of the Alton's dominion over the S. & S. tracks was founded on the view that the evidence warranted the jury in finding that "the tracks were S. & S. plant facilities, and not instru-

mentalities for the Alton's use in discharging its duties to the public." In other words, the Circuit Court of Appeals held that under the facts as disclosed by the record the jury were fully justified in reaching the conclusion that this $1 per car refund was in truth and in fact a rebate from the tariffs and charges of the Chicago & Alton Railway Company. The verdict of the jury finding each of these defendants guilty necessarily rejects the claim of the defendants that this money was paid by the railway company *as a rental for the use* of the S. & S. tracks. Under the agreed statement of facts there was nothing which required the jury to conclude that this $1 per car was paid to the S. & S. Co. for the use of its tracks, and even though such an inference might have been drawn from all the facts in the case, the jury was certainly at liberty to conclude that such a claim was without any foundation to support it. In this view of the case we submit that the decision of the Circuit Court of Appeals in affirming the judgment of the trial court was correct and should not be disturbed.

III.

Several points in petitioner's brief as to why a writ of certiorari should issue in this case are based upon an alleged contrariety of opinion among the judges of the Circuit Court of Appeals and the Interstate Commerce Commissioners with respect to the application of certain principles of law to interstate transportation and instrumentalities.

We dismiss such points from consideration as furnishing no substantial reason for the granting of a

writ of certiorari in this case. If, for example, there is any difference of opinion between the learned judges of the Circuit Court of Appeals as to whether property becomes interstate commerce the moment it is delivered to and accepted by the carrier for the purpose and with the intention of being transported in interstate commerce, such difference of opinion would certainly be of little consequence in view of the repeated decisions of this court clearly defining the moment when interstate transportation begins and terminates. (*Coe* v. *Erroll*, 116 U. S., 517; *Rhoades* v. *Iowa*, 170 U. S., 412; *Vance* v. *Vandercook*, 170 U. S., 438; *Heyman* v. *Southern Railway Company*, 203 U. S., 270.)

It is entirely unnecessary that this writ should issue in order that *certain language* which was used by the Circuit Court of Appeals in this case may be modified so as to conform to the numerous decisions of this court rendered in similar cases. We by no means concede that the language of the Circuit Court of Appeals is susceptible of the various constructions and interpretations contended for by counsel for the petitioners. It is evident from the *per curiam* on the petition for a rehearing that the Circuit Court of Appeals was impatient with counsel for the manifestly unfair inference which they insisted upon drawing from the language of the main opinion.

IV.

Conceding for the purpose of the argument that a carrier may pay to a shipper a reasonable charge or compensation for any service rendered by the shipper to the carrier in connection with the transportation or the furnishing of any instrumentality used therein, such fact would have no application to the case at bar, for the reason that the situation here was by no means similar.

It may well be questioned whether prior to the Hepburn Act of June 29, 1906, a common carrier was authorized or permitted under the law to repay or refund to the shipper even reasonable charges and allowances for services which the shipper may have rendered in connection with such transportation or instrumentalities which the shipper may have furnished the carrier for use therein. Much confusion has been injected into this case by attempting to apply certain provisions of the Hepburn Act of June 29, 1906, to the situation in this case, a situation which existed more than a year prior to the passage of that act. Many of the decisions of the Interstate Commerce Commission, which are cited in petitioner's brief, refer to matters which have arisen since the passage of the Hepburn law. The provisions of this act to which I refer are as follows:

> If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the

> maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section. (Sec. 15.)

It must be remembered, however, that while a contract of such a character is recognized by the new interstate commerce law, provision is made in section 6 of the same act for the filing and publishing of such special agreement or understanding. The language of section 6 to which we specifically refer is as follows:

> *Nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.* (Sec. 6.)

If, therefore, a contract should be entered into to-day between the Chicago & Alton Railway Company and the S. & S. Co. for the payment by the Alton Company to the S. & S. Co. of $1 a car *for the use of the tracks* of the S. & S. Co. in connection with such transportation, such contract and the amount of such refund would be required to be published by the Alton Railway Company in the same manner as it files and publishes its other tariffs and schedules of rates and charges. We do not wish to be understood as conceding that a contract *for the use* of the S. & S.

Co.'s tracks by the Alton road *based alone upon the number of loaded cars delivered by the S. & S. Co.* to the Alton road for interstate transportation would be legal, even under the new law. We are inclined to think that it would not. We have no hesitancy, however, in saying that such a contract was not contemplated by the old law, and no provision was made by which it could be recognized and regulated.

V.

Weleetka Light & Water Company v. The Fort Smith & Western Railroad Company.

Counsel for the petitioner seem to attach great importance to the recent ruling of the Interstate Commerce Commission in the case of the *Weleetka Light & Water Company* v. *The Fort Smith & Western Railroad Company*. It is difficult to see wherein that case has any relevancy or bearing upon the facts presented by the case at bar.

The Fort Smith & Western Railroad Company prior to December, 1905, when the property and plant in question was owned by another company, had built a spur track connecting it with the main tracks of the railroad company under a contract which required the cost, amounting to about $400, to be repaid to the railroad company. In the month of March, 1906, the old company became insolvent and the railroad company, desiring to make use of the ties and rails of which the spur track had been constructed, took them up and removed them to another point in the town, where it built

a switch to another industry. Subsequently this property was acquired by the Weleetka Light & Water Company, and later on, after the passage of the Hepburn law, an application was made by the Weleetka Light & Water Company to the Interstate Commerce Commission to require the railroad company to relay the spur track. At the time of the hearing it appeared that the railroad company offered to relay the spur track upon the condition that the complainant should first advance the cost, which was estimated by the defendant at $250. It was stated that after the switching connection had been made the railroad company was willing to repay the cost to the Weleetka Light & Water Company by making it a definite allowance of $2 for each car placed upon the switch track by the defendant, excluding, however, such cars as may be switched there by the defendant from the lines of competing carriers in Weleetka. The only issue which was not fully agreed to by and between the parties related to the location of the switch connection. The Commission held that if they did not decide upon that matter within thirty days that the Commission would decide it for them.

It is quite evident that the proceedings and hearing in this case were had under and pursuant to the provisions contained in section 15 and section 6, heretofore quoted from the new rate law, and the case, therefore, has no special significance as a precedent for the case at bar. At the time of the payment of the rebates to the S. & S. Co. by the Chicago & Alton

Railway Company, there was no provision of the interstate commerce law regulating the matter or permitting such a contract to be entered into; nor was there any provision requiring the contract and the amount of money refunded to be published as a part of the tariffs and schedules of the carrier. Under the law as it then existed an arrangement of this character between the two companies, to wit, the shipper and the carrier, could not for reasons of public policy be sanctioned or recognized by the law. The refund of such terminal charges by the railway company to the shipper, under the circumstances detailed in the record, was necessarily illegal. The fact that the new rate law to-day might sanction and permit an arrangement or contract of this character certainly could not extract from these old cases the vice of their illegality.

CONCLUSION.

In conclusion, we desire to again direct the attention of this court to the agreed statement of facts upon which the jury returned a verdict of guilty as to each of the defendants in this case. This agreed statement of facts contains the only evidence which the jury was entitled to consider, and it may be searched in vain for one word or sentence conveying the idea that the $1 per car was paid by the Alton road to the S. & S. Co. *for the use of the tracks* of the last named company. In other words, under the facts as they stood admitted the jury was practically compelled to find that this refund of $1 per car

was paid to the S. & S. Co. *as a rebate* whereby its property was transported in interstate commerce by the Alton road at less than the legal rate. There was absolutely no escape from such a conclusion. The decision of the trial court, and the Circuit Court of Appeals in affirming the judgment of the lower court, were therefore right, and no benefit can result to these petitioners by the issuance of a writ of certiorari in this case.

Respectfully submitted.

HENRY M. HOYT,
Solicitor General.
MILTON D. PURDY,
Assistant to the Attorney-General.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1907.

CHICAGO & ALTON RAILWAY COMPANY, Petitioner,
vs.
UNITED STATES OF AMERICA, Respondent.
No. 557.

JOHN N. FAITHORN, Petitioner,
vs.
UNITED STATES OF AMERICA, Respondent.
No. 558.

FRED A. WANN, Petitioner,
vs.
UNITED STATES OF AMERICA, Respondent.
No. 559.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MR. F. S. WINSTON,
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MR. S. H. STRAWN,
MR. BLACKBURN ESTERLINE,
Of Counsel.

GUNTHORP WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

CHICAGO & ALTON RAILWAY COMPANY,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

JOHN N. FAITHORN,
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vs.
UNITED STATES OF AMERICA,
Respondent.

FRED A. WANN,
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vs.
UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The facts of the case are fully set forth in the petition for the writ of certiorari filed herewith, and this brief will therefore be confined to the law.

First. The first point made in the petition for the writ of certiorari is that the Court of Appeals erroneously decided that a common carrier could not, for a reasonable compensation, acquire the right to use and operate an industrial track, because in the language of the court "it is for private purpose."

That holding is now a part of the judicial records of

the country by a court of eminent judges. The effect of that holding may be illustrated. A railroad company has a line from New York to Chicago. It operates terminals at both points. Those cities have grown up by the vast industries which they maintain. In Chicago there are the packing industries, the harvester machine industries and other industries on which the welfare and upbuilding of the country depend. In New York City there are the mercantile and shipping industries. The people of the City of New York depend upon the packing industries of Chicago for meat and food. The people of the City of Chicago depend upon the City of New York for clothing and household furnishings. Without the medium of the railroads the life of both places must necessarily decline. No legislative body, no judicial tribunal should ever lend its aid to any law or judgment which would deter the wellbeing of either place when all may prosper within bounds of the law. To say that railroads at each place should stop their trains at their particular stations, and not push on through the yards, plants and buildings of these vast industries, would be to destroy the facilities with which the means of each are supplied.

The language of the Court of Appeals is (Rec., 89):

> "But manifestly the Alton Company could not condemn the S. & S. tracks for the sole purpose of hauling the S. & S. Co.'s product from its warehouse to the Alton's public highway, because that would be a private purpose. Whatever property the Alton could condemn, it could acquire by deed or lease; but by taking a lease it could not change a private purpose or use into a public one."

The language of the concurring opinion is (Rec., 91):

> "Now I am inclined strongly to the judgment that through contract with the parties interested the Railroad Company could, at its own expense, lawfully have laid its own rails up to and alongside of the S. & S. Company's warehouses, notwithstanding the fact that title to the land under the rails should remain in the S. & S. Company; or could have leased the rails laid by the S. & S. Company of that company."

Thus, this eminent court is divided. That fact alone throws the question in doubt, and the question with which the petitioners, the railroads and the shippers throughout the nation are concerned is, may it do so, or may it not do so?

It was held by the Court of Appeals in the case (Rec., 88) that the sum paid for the use of the industrial track in controversy was a reasonable sum and that it was not a device for paying an unreasonable sum. But here is a railroad company and two of its officers convicted of crimes and heavily fined, with two eminent judges holding that the railroad company had no power (be the sum paid therefor ever so reasonable) to lease or own the tracks to the industrial plant, and a third eminent judge holding that he is strongly inclined to the judgment that it might have done so. On this question these petitioners and the carriers and shippers of the nation are entitled to the opinion and judgment of this court, either condemning the holding of the Court of Appeals; or affirming the same, or eliminating it from the case.

The petitioners submit that the opinion of the majority of the Court of Appeals is palpably erroneous.

We contend that a railway company engaged in interstate commerce has the power, provided the law of the state where the property is located permit it, to acquire by eminent domain, lease or purchase, any spot of ground within the control of any state in which it operates which might facilitate the service which the carrier renders to the public. As an illustration: The meats shipped by the S. & S. Company are sold on all the markets of the nation. By war, famine or pestilence the live stock of the New England States may be extinguished. In order that the inhabitants of that country may be supplied with meats the common carriers must furnish these facilities. If the petitioner, Chicago & Alton Railway Company, desires to ship meats and packing house products from Kansas City or Chicago to Boston, on what principle could it be contended that the condemnation, if the law of Kansas permitted it, of a right of way and the laying of rails into the very heart of the S. & S. Company's plant at Kansas City, for the purpose of receiving for transportation dressed meats and packing house products for the New England States, was not for a public purpose and for the public good?

The wants and needs of the people of Oregon may justify the condemnation by a railroad company of an acre of private ground in the State of Florida in order that the railroad company might receive products of that state to transport to the people of Oregon for their needs. Such condemnation clearly would be for a public purpose. As Chief Justice Marshall said, "In war we are one people, in peace we are one people." So that when the wants and needs of the pub-

lic at any corner of the nation are to be satisfied by the condemnation of a piece of property by a common carrier at another corner of the nation, and the legislature so decrees, the power of eminent domain is always complete, and the only restraint with which it shall be exercised is that the property shall not be taken without just compensation.

The laws of many of the states, including the State of Kansas, where this transaction took place, and which will be referred to again, confer upon railroad companies the right of condemning and appropriating land and laying out and constructing any spur, switch or railroad track thereover to any private industry upon the theory that such construction, though it serve but one industry, is for a *public purpose*.

In Wisconsin, Section 1831a, of the Revised Statutes of 1899, provides that:

> "Every railway company existing in whole or in part under any law of this state and operating a railway therein may build, maintain and operate branches and spur tracks from its road or any branch thereof to and upon the grounds of any mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock or other industry or enterprise; * * * and may acquire by purchase or condemnation in the manner provided in this chapter for the acquisition of real estate for railway purposes other than for its main track all necessary roadways and rights of way for such branches, spur tracks," etc.

In construing the constitutionality of this statute as affecting property rights in Wisconsin, the Supreme Court held that it did not violate the constitution by providing for the exercise of the power of eminent

domain for other than public uses, though authorizing it for the benefit of a single industry.

C. & N. W. v. *Morehouse*, 1901, 87 N. W., 849.

In the particular case the question was whether a railroad company had a right to condemn land for the purpose of serving a private ice house. In deciding this question the court said, on page 853, as follows:

> "From the foregoing it will be seen that whether a particular use of property may reasonably be declared public has been solved uniformly according to circumstances. That the agency seeking to take the property by legislative authority is essentially quasi public agency, as a railway corporation, has a very important bearing on the question, and likewise does the importance of the particular industry to be promoted; and the two together have generally been deemed controlling. Where the mining of coal is an important industry, it is held that the legislature may legitimately say that the taking of property for a railroad, indispensable, or reasonably necessary to the successful operation of a particular coal mine, is a taking of property for public use. Where lumber industries are important factors in the employment and enrichment of the people, the taking of private property for a railroad for the convenience, in the main, of the proprietors and patrons of an industry of that kind, is deemed a taking of private property for public use. Where the fertilization of arid lands is deemed material to the development of the country, it is held to be within legislative discretion to declare the taking of private property for irrigating canals a taking of such property for public use. In the early settlement of the country the importance to the general welfare of establishing and maintaining grist mills was such that it was held that the use of the land covered by back water from the mill dams

was a public use thereof within the meaning of the constitution. The instances are very few where a grant of power to a recognized public agency, such as a railroad corporation, to exercise the power of eminent domain to acquire private property for its right of way, either for its main track or for its side tracks or spur tracks to be operated as a part of its railway system, the right to declare what shall be *deemed a public use being vested primarily in the legislature, has been condemned by the courts.* We cannot discover any good reason for condemning the legislative action in question in this case, and therefore must affirm the order appealed from."

In Indiana it is provided by statute as follows:

"Any railroad company organized under the laws of this state is hereby authorized to build and operate in addition to the main line authorized by its charter or articles of association, branch railroads from any point or points on its main line to or through any adjacent mineral lands, containing coal, iron or building stone, not, however, exceeding a distance of fifty miles from the nearest point on said main line."

Sec. 5301, Burns' Ann. Stat., 1901.

It is clear that under this law a railroad company could build an extension or switch track from its right of way as originally fixed to an industrial plant, such as an iron mine, or coal mine, or stone quarry.

In Maryland, by statute, a similar right of condemnation is permissible.

New Central Coal Company v. *George's Creek Coal and Iron Company*, 37 Md., 537 (562).

In South Carolina land may be condemned by a rail-

road company for the purpose of constructing an industrial track.

Ex parte Bacot, 30 A. & E. R. R. Cases, 597.

In Minnesota private property may be condemned for the purpose of building a switch track to serve a private industry. It is there said:

"The character of the use, in the case of a railroad or railroad track, does not depend on the amount of business or the number of persons who may have occasion to use it, *but on the right of the public to the benefit of it.*"

C., B. & N. Ry. v. *Porter*, 46 N. W., p. 75 (76).

In Elliott on Railroads, Edition of 1897, Sec. 399, the author says:

"The authorities with good reason discriminate between the power to acquire property by grant and the power to obtain by the exercise of the right of eminent domain. Statutes conferring the authority to condemn property are, as is well known, strictly construed, and their operation is seldom enlarged by implication. Where property is seized by virtue of the eminent domain it is taken against the owner's will, while in the case of a grant he voluntarily conveys to the company. Property legitimately connected with the purpose of the corporation may be rightfully acquired, although the connection be remote. It is not essential in case *of purchase* that the property be immediately connected with the corporate purpose; it is sufficient if it be reasonably necessary to the *convenience* of the company and those dealing with it. They may acquire land by *purchase* for many purposes that *would not be sufficient to warrant the seizure under the right of eminent domain.*"

In connection with the text of the learned author, the attention of the court is respectfully called to Section 5 of Article 13 of the Constitution of the State of Illinois, which reads as follows:

> "All railroad companies receiving and transporting grain in bulk or otherwise, shall deliver the same to any consignee thereof to which it may be consigned, provided such consignee * * * can be reached by any track owned, leased or used, *or which can be used by such railroad companies;* and all railroad companies shall permit connections to be made with their tracks so that any such consignee, coal bank or coal yard may be reached by the cars on said railroad."

Although in Illinois there is no statute providing for acquisition by condemnation of an industrial track, nevertheless, here in the constitution we find it clearly intimated that a railroad company may acquire, by lease, the tracks running to such plants, and if it can acquire by lease of course it may pay the rental provided therefor.

The same law prevails in Missouri, through which state the road of the Alton Company runs. Section 1113 of the statutes of the state provide that:

> "Every railroad corporation * * * which shall receive any grain in bulk for transportation shall deliver the same to any consignee * * * : provided such person * * can be reached by any track owned, leased or used, or which can be used by such corporation." * * *

In Missouri, it is also provided by law as follows:

> "Any railroad company organized under the laws of this state or under the laws of any other state, a portion of whose line of railroad is constructed within this state, shall have the right to build extensions * * * of its line

of railroad within this state of such length and in such direction as it may be authorized by resolution adopted by its board of directors."

Sub-section 2, Sec. 1035, General Statutes of Missouri, Edition 1906.

As a further illustration of this point, it was held in *St. Louis & San Francisco Railroad Company* v. *Foltz*, 52 Fed., 627, that though a foreign railroad corporation had no right to condemn in the State of Arkansas, it could acquire land by grant or deed.

For this erroneous ruling of the majority of the Court of Appeals, which results in lack of uniformity of decision among the courts, the petitioners respectfully submit this court should grant the petition for the writ of certiorari.

Second. The second point made in the petition for the writ of certiorari is that the Court of Appeals erroneously decided that industrial tracks and switches are not a part of the highways of commerce, and *pro tanto* equivalent to an equal amount of railroad terminals.

The petitioners submit that a car and its contents are in interstate commerce the moment they begin *to move* or are *started* on the journey from a point in one state to a point in another state, and that all of the track and roadbed over which the car moves after it has so started, constitute a part of the highways of interstate commerce and are subject to all of the laws regulating the same. It is also submitted that for the use of any part of such highway of commerce, if it is not owned by the carrier undertaking the transportation, such

carrier is entitled to pay to the owner, whoever he may be, a reasonable compensation. This argument was made at the Bar of the Court of Appeals by counsel for petitioners and was opposed by counsel for the Government. The majority of the court held against it. Thus (Rec., 89):

> "It (the Alton Company) had undertaken to carry for all the shipping public a carload of meats from Kansas City, Kansas, to New York, for $20, say. For that purpose it controlled by means of its connections a public highway. The S. & S. tracks were not a part of that highway. They were not used by the Alton in serving the shipping public generally. Their only use was in getting a particular shipper's freight from his own property out to the public highway. Suppose that the S. & S. Co., instead of ties and rails, had put down a paved roadway on its land, and that the Alton, in addition to the $20 worth of transportation it was giving to other shippers, furnished horses and wagons to haul the meats from the packing rooms to the Belt Line, would it be contended that the Alton could lawfully still further pay the S. & S. Co. for the use of the pavement? Or suppose that the S. & S. plant was all under one roof, and the trolleys which convey carcasses and cuts of meat from one department to another were so arranged that the finished product arrived at the property line adjoining the Belt tracks, could the Alton properly make an allowance for the use of the trolleys as instrumentalities furnished by the shippers in the transportation of property in interstate commerce? In our judgment the jury were warranted in finding that the tracks in question were plant facilities as clearly as the suppositions pavement and trolleys would be plant facilities, and not instrumentalities for the Alton's use in discharging its duties to the public."

The concurring opinion held for it. Thus (Rec., 91):

> "In other words, under the facts presented, the published rate is not affected by the fact that the cars were loaded, at the S. & S. Company's warehouses and not on the company's rails—such place of loading being, along with the railroad company's freight stations, 'Kansas City' was within the meaning of the published rates,"

Thus the eminent court is again divided. The question with which the carriers and shippers throughout the nation are concerned is, do the track and roadbed over which a shipment moves after it is received by the carrier and begins to *move* to its destination, or is *started* on its journey, constitute a part of the highways of commerce with the trunk line; or is it the law as stated by the majority opinion, that the car does not strike the highways of commerce until after it has moved a considerable distance on such journey? If the rails and roadbed over which the car passes from the moment it begins to *move* or from the *moment* it is *started* on its journey, constitute a part of the highways of commerce, as we contend they do, then the railroad company is at the expense, if it does not own the same, of paying for the use thereof, whether they belong to another carrier, or company, or a shipper; and in any case the ownership is immaterial. Of course if the shipper owns the track the carrier may not pay an unreasonable sum for its use. But that question does not arise here as the sum paid was concededly reasonable. It is enough to say that the carrier is entirely justified in parting with its money to pay a reasonable sum for the use of a national highway of commerce. The right to use these tracks was a direct financial advan-

tage to the carrier company. While it is true that these tracks were built by the S. & S. Company, and were maintained by it, they furnished the means of not only distributing its products to the markets of the nation, but they also furnished terminal facilities to the railroad companies using the same, which if they had not existed would necessarily have had to be duplicated elsewhere. The railroads at the gateway of Kansas City were obligated to provide yards and other terminal facilities for *all* shippers, including the S. & S. Company with its great traffic. Not only were they to provide team tracks, warehouses and other accommodations for delivering and receiving freight, but space and tracks upon which to perform their own railroad work. To the extent they obtained from the S. & S. Company the right to use its lands and tracks, *for a fair and reasonable consideration, they obtained the same for their own corporate purposes and were within the bounds of law.* Such an arrangement naturally relieved *pro tanto* the congestion at the main terminals of the roads.

Very recently the Interstate Commerce Commission sustained the right of the Chicago & North Western Railway Company to assess a car service charge against the Cudahy Packing Company for the use of its spur on which the private car of the packing company stood, which spur was used for no other purpose.

Cudahy Packing Co. v. C. & N.-W. Ry. Co., decided October 7, 1907.

The basis of that report and decision was the holding of private cars on a spur track tended to congest the terminal. The Commission in that case recognized

the right of the carrier to build its tracks up to the loading docks of the packing company to serve that plant alone. But if the Court of Appeals in the case at bar is correct, the furnishing and operation by a railroad company of such a track is a rebate pure and simple because for a private purpose. It is submitted that such is not the law.

Indeed, from the standpoint of "public policy," it is submitted, *arrangements such as the one involved in this case are to be commended rather than denounced as criminal.*

The Court of Appeals held that the amount paid was a reasonable compensation for the service rendered. That being the case, the law was entirely satisfied when the Alton Company took from its treasury a sufficient sum to pay a reasonable compensation for the use of a part of the national highways of commerce which it was operating.

Third. The third point made in the petition for the writ of certiorari is that the Court of Appeals erroneously decided that property does not become property in transit in interstate commerce the moment it is delivered to and is accepted by the carrier. The language of the Court of Appeals is (Rec., 89):

> "the Alton did not take a lease of the S. & S. tracks for the purpose of discharging its undertakings as an interstate common carrier. It had undertaken to carry for all the shipping public a carload of meats from Kansas City, Kansas, to New York for $20, say. For that purpose it controlled, by means of its connections, a public highway. The S. & S. tracks were not a part of that highway. They were not used by the Alton in serving the shipping public generally. Their only

use was in getting a particular shipper's freight from his own property out to the public highway."

The concurring opinion of the minority is (90):

"My personal view is that the *moment* the products of the S. & S. Company passed out of its hands into the cars of the Terminal Company for transportation, whether the cars thus receiving such products were at the time on the rails belonging to the S. & S. Company, or on the rails belonging to the Railroad Company, the interstate transportation of those products had already commenced; and that the published rate is a rate for the whole of that transportation, *from the moment it thus begins to the moment the goods reach their destination.*"

Thus, this eminent court is again divided. The question with which the carriers and the shippers throughout the nation are concerned is, when does interstate commerce *begin?* This court has, by a line of decisions, held, as we think, when interstate commerce commences, but the law laid down by the Court of Appeals is against that line of decisions and tends to confuse it. We now have on the statute books what is known as the "*Safety Appliance Act*"; and what is known as the "*Meat Inspection Act*"; and what is known as the "*Employers' Liability Act*"; and what is known as the "*Cullom Act*"; and what is known as the "*Elkins Act*"; and what is known as the "*Hepburn Act.*" Any food product sought to be transported from a point in one state to a point in another state does, at some particular moment, with the equipment provided for its transportation, become subject to all of the foregoing laws, and this court has established the rule. For violation of many of those laws to which we have

referred, fines are assessed and imprisonment is provided. Any pronouncement, by any judicial tribunal high or low, on such a vital question, is one on which the carriers and shippers of the nation are entitled to the judgment of this court. The effect of the majority opinion of the Court of Appeals is that dressed meats and packing house products are not articles in interstate commerce until after they have passed out over the tracks in the S. & S. Company's plant and are set on the tracks of the Belt Railway, even though they are on the journey. The effect of the concurring opinion of the Court of Appeals is that the moment the switch engine hits the loaded car and the coupling is made and the drive wheels turn to forward the car, that car, *ipso facto*, starts in interstate commerce and all the equipments and products constituting the transportation are subject to the laws regulating the same.

That is also the contention the petitioners make as being the law of the land.

As illustrative of this point the attention of the court is called to the act generally known as "The Meat Inspection Act," passed by Congress on June 30, 1906, which provides as follows:

> "That on and after October 1, 1906, no person, firm or corporation shall transport or offer for transportation, and no carrier of interstate or foreign commerce shall transport or receive for transportation from one state or territory or the District of Columbia, to any other state or territory or the District of Columbia, or to any place under the jurisdiction of the United States, or to any foreign country, any carcasses or parts thereof, meat, or meat food products thereof, which have not been inspected, examined and marked as 'In-

spected and Passed,' in accordance with the terms of this act, and with the rules and regulations prescribed by the Secretary of Agriculture."

Ch. 3913, Statutes 1906.

Suppose that the cars of the railroad company are set out at the loading docks of the S. & S. Company and after loading are sealed, and carded to some point beyond the State of Kansas, but not examined and marked "Inspected and Passed." These cars, of course, are not to be broken open until they reach their destination. The engine of the belt line hitches on to the cars so loaded, sealed and carded, at the docks aforesaid, and proceeds to haul the same over the switch tracks belonging to the S. & S. Company and over its own tracks, for the purpose of delivering the same to the Alton Company. As the result of this movement and before the cars have reached the tracks of the Alton Company, suppose that the S. & S. Company is indicted "for offering for transportation in interstate commerce meat and meat food products, without having the same examined and marked 'Inspected and Passed,' as required by the Act," and simultaneously therewith the Belt Line is indicted for receiving for transportation in interstate commerce meat or meat food products not marked as required by the Act. If in such a case the S. & S. Company and the Belt Line should set up as a defense that the goods had neither been offered or received for transportation in interstate commerce and the question of their guilt or innocence was before the court for consideration, could the court reach any other conclusion than that the act had been violated the instant when the engine of the Belt Line began to

move the car from the loading docks of the S. & S. Company on its way towards its ultimate destination?

This suggestion seems to be sufficient to demonstrate that "railroad track" is not for the purpose of interstate commerce, at all synonymous with "plant facilities," and may not be considered as such; but on the contrary it would seem to indicate that "railroad track" *is an instrumentality used in connection with the transportation of the freight within the meaning of that phrase as used in Paragraph 15 of the Hepburn Bill, which, as stated by the court, is but declaratory of the law as it previously stood.*

These are questions of great moment, on which not only these petitioners, but the carriers and shippers of the nation are vitally concerned.

In *The Daniel Ball,* 10 Wall., 557, 565, this court, speaking through Mr. Justice Field, said:

> "Whenever a commodity has begun *to move,* as an article of trade, from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation it is subject to the regulation of Congress."

In *Coe* v. *Erroll,* 116 U. S., 517, this court, speaking through Mr. Justice Bradley, said (526):

> "The point of time when state jurisdiction over the commodities of commerce begins and ends is not an easy matter to designate or define, *and yet it is highly important both to the shipper and to the state that it should be clearly defined so as to avoid all ambiguity or question.*"

The learned Justice, after observing that goods when *actually started* in the course of transportation to another state, *or delivered to a carrier for such transportation*, are subject to the acts regulating commerce, said (525):

> "There must be a *point* of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that *moment* seems to us to be a legitimate one for this purpose in which they *commence* their final movement for transportation from the state of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an *entrepot* for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are *committed to the comomn carrier for transportation* out of the state to the state of their destination, or have *started* on their ultimate passage to that state."

The learned Justice then states what the court thinks must be the rule on this subject, and that is that the power of taxation on the part of the state holds

> "until they have been shipped or *entered* with a common carrier for transportation to another state, or have been *started* upon such transportain a continuous route or journey." (527)

After quoting from *The Daniel Ball, supra*, he says (528):

> "But this movement does not begin until the articles have been shipped or *started* for transportation from the one state to the other. * * * Until actually launched on its way to another

> state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain."

In *Kidd* v. *Pearson*, 128 U. S., 1, 24, this court, speaking through Mr. Justice Lamar, cited with approval the above language from *Coe* v. *Erroll* and *The Daniel Ball*.

Under the acts of Congress above referred to, and in the light of the decisions which we have cited, it is submitted that when the car *started* on its journey, that it simultaneously became a car in interstate commerce, and it and all its contents were subject to regulation as such. On these authorities it is submitted that the holding of the majority of the Court of Appeals that interstate commerce did not begin the *moment* the cars began to *move* and the *moment* the cars *started* on their journey, but that it commenced after the cars were set upon the line of the Belt Railway, is erroneous, and results in lack of uniformity of decision among the courts, for which this court should grant the petition for a writ of certiorari.

Fourth. The fourth point made in the petition for writ of certiorari is that the Circuit Court of Appeals decided that if a rate is paid in money or money's worth, it can never be a rebate, which ruling is in direct conflict with the reports of the Interstate Commerce Commission previously and subsequently made.

The majority of the court held that (Rec., 88):

> "S. & S. received back a part of the money they paid the Alton for freight. That fact alone does not prove that the transaction constituted a rebate within the definition of the statute. A rail-

road may pay its lawful indebtedness to a shipper out of the money the shipper pays it for freight; or a shipper may pay the full freight partially in money and partially in cancelled legal demands against the railroad. The statute's definition of a rebate is any device whereby any property in interstate or foreign commerce is transported at a less rate than that published and filed. *So if the full rate be paid, either in money or in money's worth, the parties cannot be guilty of rebating.*"

At the time this ruling was made the Interstate Commerce Commission had published certain administrative rulings, and opinions, one of which became effective September 15th, 1906, as follows:

> "Nothing but money can be lawfully received or accepted in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates in effect at the time precludes the acceptance of services, property or other payment in lieu of the amount of money specified in the published schedules."

In *Weleetka Light & Water Company* v. *Fort Smith & Western Railroad Company*, No. 997, I. C. C., decided November 4, 1907, the Water Company sought to compel the railroad company to construct a switch track to its plant. Differences arose about the terms and conditions upon which the railroad company would construct the track. At the hearing the railroad company proposed to complete the connection it had already commenced, provided the Water Company would first advance the cost, estimated at the sum of $250; and that after the connection had been made,

it would repay to the Water Company the cost of the switch by making it a definite allowance of $2 for each car placed upon the switch track. The Commission made no order, but on the question of allowing a definite amount on each car of freight put upon the switch, said:

> "In this connection it is proper to add that *the Commission does not approve the practice of some carriers of repaying advancements made by a shipper for the construction of a switch track by making an allowance to him of a definite amount on each carload of freight shipped to or from his manufacturing plant. Such an arrangement presents too much the appearance of a purchase of property by the carrier with transportation, which is contrary to the principles of the act.* * * * Although the payments to be made by the carrier to the shipper under such contracts may properly be determined or based on the number of carload shipments made to or from the industry, such payments ought not to be made out of the rate as each car is moved, but ought to be made out of available funds at the end of definite intervals, say, of six months or a year."

As we have already pointed out in another section of this brief, the Court of Appeals in considering and deciding the case at bar, considered the Cullom act, the Elkins act and the Hepburn act, and therefore what is said in this opinion may be regarded as authority in any case involving the construction of any of these acts.

Suppose this case: The A B company owns and operates a coal mine in the State of Pennsylvania. As is well known, Pennsylvania coal is consumed in all parts of the nation. The carriers engaged in commerce among the several states receive from the coal

company for transportation to various points within the nation large quantities of coal. For the transportation of this coal the coal company desires to pay the freight charges by furnishing coal to the railroad company, which is absolutely necessary for the conduct of its business, and they seek to make contracts to that end. Before these contracts are executed both the shipper and the carrier confer with counsel. Counsel examines the decision of the Court of Appeals in this case. He reads the language above quoted and advises the shipper and the carrier that, under that decision, such a contract is entirely lawful and its execution and performance will be sanctioned by the United States courts. Thereupon the contracts are executed, the carriers undertake to transport the coal and the coal company pays the transportation charges by furnishing coal to the railroad. Any lawyer in reading the opinion of the Circuit Court of Appeals would be amply justified in advising that such an agreement may be performed. If the decision of the Court of Appeals is erroneous, it should be condemned in order that it may not become a pitfall.

As is well known, railroad companies have, in the past, made contracts with newspapers by which advertising is paid for by transportation; they have made contracts with telegraph companies by which certain property of the latter are transported in consideration of the services which the telegraph company renders the railroad. There are a vast number of other arrangements and agreements which railroad companies have been making for the convenience of their business, for which payment of

services are rendered by the transportation of passengers and freight, and there has been great confusion among traffic officials, operating officials and attorneys of these carriers as to what railroad companies may or may not do in respect of such matters. If the decision of the Court of Appeals in this case stands unreversed and unmodified, a railroad company has the right, at least within the Seventh Circuit, to make contracts with shippers by which the shippers will furnish their products which are necessary to the railroad company in conduct of its business, in payment of transportation charges, and any lawyer would be justified, under that decision, in advising railroad companies and shippers that such was the law, but what a hardship it would be on a railroad company, its officers and officials and its counsel, to be called to account for a transaction sanctioned by the Circuit Court of Appeals and possibly fined or imprisoned for the violation of the law.

The language of the Court of Appeals is a part of the judicial records of the country. It is clear and unmistakable that if the shipper pays "in money or money's worth" the provisions of the statute are satisfied. If the statement of the Circuit Court of Appeals is correct, this court should affirm that ruling, in order that there may be no doubt in any part of the nation as to the correctness of the language there used. If, on the other hand, the construction of the act by the Circuit Court of Appeals is erroneous, then this court should review the case and condemn the language there used. All the railroads of

the country and the shippers doing business therewith are confronted with the decision of the Court of Appeals on the one hand, that payment of freight charges may be in money or in money's worth, and with the administrative ruling of the Interstate Commerce Commission, and the language of the Hepburn act on the other hand that:

> "Nothing but money can be lawfully received or accepted in payment for transportation * * * whether of passengers or property, for any service in connection therewith," and
>
> "Nor shall any carrier charge or demand or collect or receive a greater or less or *different* compensation for such transportation of passengers or property," etc.

This question is one of vast importance. It affects the petitioners who are still engaged in the railroad business. It affects every railroad company and shipper in the nation. This question alone, whether decided correctly or erroneously by the Court of Appeals, should be reviewed by this court and the language of the Court of Appeals sustained or condemned as this court may adjudge. Otherwise, if the language is not a true statement of the law it may result in landing an innocent man, who has relied upon it and upon the advice of counsel, behind the walls of the penitentiary.

Fifth. The fifth point made in the petition for a writ of certiorari is that the Court of Appeals erroneously decided that a carrier company organized under the laws of the State of Kansas may not acquire property in Kansas in accordance with the provisions of the laws of that State.

It is said that the acquisition by the carrier company of the switch tracks in question, could not have been obtained by condemnation, because it would have been for a *private* purpose, and therefore the land could not have been obtained by deed or lease, because by taking a lease "it could not change a private purpose or use into a public one."

The petitioners, however, respectfully submit that whether or not the right to lay and use the tracks in question could have been acquired by condemnation, is purely a matter of statutory law, depending upon the laws of the state where the condemnation is sought. In other words, it is a matter of property rights which may or may not exist. It is clearly within the power of the Legislature to confer upon a railroad company the right of constructing switch tracks into private industrial plants. The tracks in controversy in the case at bar were located in the State of Kansas. The power of a railroad company to condemn land in Kansas is controlled by the law of Kansas. In that state all corporations are formed under one law. Such corporations, which include railroad companies, are given the power to

> "hold, purchase, mortgage or otherwise convey such real and personal estate as the purposes of the corporation shall require."
>
> (Sec. 1341, of the General Statutes of Kansas.)

Such corporations also have power to take and hold such "*voluntary grants of real estate and other property as shall be made to it.*" * * *

> (Sec. 1382, of the General Statutes of Kansas.)

The statutes of the state also provide as follows:

> "Any person, upon written permission given by the board, may exercise, in the same manner and to the same extent as is now enjoyed by railroad companies, the right of condemning and appropriating land and laying out and constructing any spur, switch or railroad track thereover, and connecting the same with any railroad already constructed; and the right to use such spur, switch or track shall be public, at rates and on terms and conditions such as the board (referring to the Railroad Commission) shall prescribe, if the parties interested cannot agree."
>
> (Sec. 6468 of the General Statutes of Kansas.)

It is clear that under the laws of Kansas, the acquisition of the ownership of such tracks, or the right to use the same by railroad companies, is not unlawful, but is in fact authorized by the state statute.

Sixth. The sixth point made in the petition for the writ of certiorari is that there is a divergence of opinion between the Interstate Commerce Commission and the concurring opinion of the Court of Appeals on the question whether or not the point "Kansas City" is limited to the tracks, switches and siding of the Alton Company, or whether it extends beyond and includes the tracks, switches and sidings of other companies in Kansas City, within the meaning of the phrase "Kansas City" as used in the published tariffs.

The act entitled "An Act to Regulate Commerce," approved February 4, 1887, after providing that every common carrier shall print and keep open to public inspection schedules showing the rates, fares and charges for transportation, further provided that:

> "The schedules printed as aforesaid by any

such common carrier shall plainly state the *places* between which property and passengers will be carried."

The act then provides that it shall be unlawful for any common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation than is specified in such published schedules.

By an act entitled "An Act to Regulate Commerce," approved February 19, 1903, it was further provided that:

> "The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense."

By an act entitled "An Act to Regulate Commerce," approved February 11, 1887, amended June 29, 1906, it was provided by section 6 as follows:

> "That every common carrier subject to the provisions of this act shall file with the Commission created by this act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different *points* on its own route and between *points* on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to

the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require."

The act further provides:

"Any common carrier subject to the provisions of this act receiving freight in the United States to be carried through a foreign country to any *place* in the United States shall also in like manner print and keep open to public inspection, at every *depot* or *office* where such freight is received for shipment, schedules showing the through rates," etc.

The act, by Section 20, further provides:

"That any common carrier, railroad, or transportation company receiving property for transportation from a *point* in one state to a *point* in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass."

When the decision of the Court of Appeals in this case became the law of the land, all of the foregoing provisions of the said acts to regulate commerce were upon the statute books. There is at this time an uncertainty among carriers and shippers as to just what interpretation to put upon the words "*places*" and "*points*" on the lines of carriers within the meaning of the published tariffs. Do those words mean, and are they limited to, the tracks, switches and sidings of

the Chicago & Alton Company? That is to say, if a shipper delivers to the Chicago & Alton Company at Chicago, Illinois, a carload of dressed meats and packing house products for delivery to a consignee at Kansas City, is the transportation complete when the Alton Company reaches its freight house at Kansas City or its switch or siding.

Or, on the other hand, do those words mean that the Alton Company may switch this car beyond its own freight houses, switches or sidings upon and over the switches and sidings of other companies to make delivery to the consignee? This question is important. It is important from a financial standpoint. Switching charges constitute a large part of the revenue of common carriers. If the point "Kansas City" includes all the tracks, switches and sidings of all the railroad companies doing business at Kansas City and the Alton Company is bound when receiving freight for transportation to Kansas City to make delivery to the consignee on the track, switch or siding of any other company at Kansas City, then it may not make a switching charge for the service performed beyond its own line, the through rate covering its entire charge. If on the other hand the point "Kansas City" is construed to mean the tracks, switches and sidings of the Alton Company's rails and a consignee desires a shipment of freight delivered to it beyond the tracks, switches and sidings of the Alton Company, the latter may make a switching charge for the service which it performs beyond its own rails in addition to the through rate from the point of origin.

This is a question upon which the Court of Appeals

in this case and the Interstate Commerce Commission are divided. The concurring opinion of the Court of Appeals held (91):

> "The published rate is not affected by the fact that the cars were loaded at the S. & S. Company's warehouses and not on the company's rails—such place of loading being, along with the railroad company's freight stations, 'Kansas City' within the meaning of the published rates."

On November 4, 1907, the Interstate Commerce Commission in the cases of *Laning-Harris Coal & Grain Company* v. *Atchison, Topeka & Santa Fe Railway Company*, Nos. 1073 and 1074, and the cases of *Leonard* v. *Chicago, Milwaukee & St. Paul Railway Company*, No. 1078; *Arkansas Fuel Company* v. *Same*, No. 1184; *Laning-Harris Coal & Grain Company* v. *Same*, No. 1075; *Star Coal Company* v. *Same*, No. 1211; *Mayer Coal Company* v. *Same*, No. 1220, and *Gray-Bryon Coal Company* v. *Same*, No. 1222, held to the contrary. In cases Nos. 1073 and 1074 the complaints were directed against certain alleged unjust switching charges collected at Kansas City upon shipments of grain. The record showed that the shipments moved from various points over the lines of defendant's road billed to Kansas City; that after arrival at Kansas City, and in most if not all of the instances after the grain had been sold, defendant was directed to deliver it to connecting carriers for delivery to it or transportation to destination not on the line of the Atchison Company. These deliveries involved movement over the Kansas City Belt Railway, for which it assessed a switching charge of $3 per car, which was collected by the defendant for and paid to the Kansas City Belt Railway. The complainants alleged that

this switching charge was a wrongful and unjust charge, and claimed that the tariff rates of the defendant to Kansas City included delivery at any point within the corporate limits of Kansas City without regard to whether it is or is not upon the lines of the defendant. In rejecting that argument and dismissing the complaint, the Interstate Commerce Commission reported:

> "This claim and argument are entirely at variance with customs of many years' standing and contemplate imposing upon the carrier a duty which it would be utterly unable to perform. The act to regulate commerce in specific terms provides that one carrier shall not be obliged to give the use of its tracks and terminals to another carrier engaged in like business. The defendant company could not deliver cars to any industry except upon its own rails without the consent and cooperation of the carrier or carriers upon whose rails the industry sought to be reached is located or via whose rails it is reached.
>
> A carrier may not reasonably be required to accept and deliver free of charge traffic which is moved by its competitor.
>
> There is no allegation that the switching charge is unreasonable in amount for the service performed except as it is claimed that it is wrongful to assess any switching charge, for the reasons just discussed.
>
> These claims involve demand for reparation as to shipments upon which such switching charges were paid from January, 1902, to date of complaint.
>
> In the absence of tariff specifications to the contrary the transportation rates shown in a carrier's tariffs to a given point are and always have been understood to include delivery to industries or unloading places located upon its own rails, and if consignee or owner of shipment orders it trans-

> ported by another carrier to another place, he must expect to pay the lawful charge for that service."

In the remaining cases cited, upon facts somewhat similar, the Commission said:

> "As said in cases 1073 and 1074, *Laning-Harris Coal & Grain Company* v. *Atchison, Topeka & Santa Fe Railway*, 12 I. C. C. Rep., 556, in the absence of tariff provision to the contrary the transportation rates shown in carrier's tariff to a given point include delivery on its own rails, and if shipper or owner of consignment requires delivery on the rails of another carrier he must pay the lawful charges of that other carrier for its services."

Because of this variance between the concurring opinion of the Court of Appeals and the numerous rulings of the Interstate Commerce Commission, this court should hear the case and render a judgment in order that any uncertainty on a question so important to the railroads and shippers of the nation may be removed.

Seventh. The seventh point made in the petition for writ of certiorari is that the Court of Appeals erroneously decided that a shipper is not entitled to receive *reasonable* compensation for services or facilities rendered by him in connection with the transportation of freight.

We have already shown in other sections of this brief that the track, switches and sidings within and around the buildings of the S. & S. Company plant at Kansas City constituted a part of the highways of commerce and are subject to all the laws regulating the same; that when the loaded car began *to move* or the

moment it *started* on its forward journey, interstate commerce commenced; and that all of the track and roadbed from the time when it so started were subject to the laws to regulate commerce. These tracks and switches, being a part of the highways of commerce and being owned by the S. & S. Company, it is entitled to a reasonable compensation for the construction and maintenance of that section of the highway of commerce used by the Chicago & Alton Company.

In the proceeding entitled, "*In the Matter of Division of Joint Rates and Other Allowances to Terminal Railroad Companies*," reported in the 10th Volume of the Interstate Commerce Reports, page 385, the Commission was investigating a large number of industrial railroads which were controlled and owned by industrial plants which they served. The industrial railroads were receiving large percentages of the through rates, and the profits resulting from these divisions of the rates, through ownership of the stock of the industrial railroads, eventually found its way back into the treasury of the shipper. There were three questions in the case:

(1) Did the fact that the industrial railroad was incorporated make any difference?

(2) Under the circumstances stated, were the industrial companies entitled to any part of the rate?

(3) If so, how much?

On the first of these three questions, the commission ruled as follows:

> "It is urged that all this is simply an arrangement between two connecting railroads, and that there is no negotiation with the shipper and no

payment to the shipper. This is mere play upon words. The Illinois Northern Railroad Company and the International Harvester Company are one and the same thing. It is entirely immaterial whether this money goes in the first instance into the treasury of the International Harvester Company or that of its creature, the Illinois Northern Railroad Company. That subterfuges of this sort cannot avail has often been decided, and was affirmed within the year by the Supreme Court of the United States in *Interstate Commerce Commission* v. *Baird*, 194 U. S., 25, *in which it was held that it made no difference whether certain contracts were entered into with a railroad company itself or with a coal company, the stock of which was entirely owned by the railroad company.*"

In other words, the commission held that it was entirely immaterial, for the purposes of the real question involved, whether there was an independent corporation intervening between the shipper and the carrier or not.

As to the second question, the commission held that the industrial railroads were entitled to a reasonable sum for the services which they rendered, and that this was true even though the sum so received was in fact a payment to the shipper out of the rate. (See pages 398 to 404, inclusive.)

As to the third question, the commission held (p. 404):

> "To the extent that they (the divisions of the rates) exceed a *reasonable sum* charged for the performance of the service, they are, in our opinion, an unlawful preference in favor of the corporation (the industrial company)."

And proceeding, the commission then fixed what, in

their judgment, was *a reasonable* sum which the shipper, through the instrumentality of the railroad which it owned could get out of the rate from the trunk line carrier for the service furnished by the shipper.

This decision of the Interstate Commerce Commission was handed down on November 4, 1904, after an investigation extending over the greater portion of the year, and it established and fixed the true rule by which all such transactions as those charged in the indictment are to be determined.

This decision of the Interstate Commerce Commission was entitled to the highest respect by the court. In *New Haven Railroad Co.* v. *Interstate Commerce Commission*, 200 U. S., p. 361, this court, referring to holdings of the Interstate Commerce Commission, said:

> "We concede that the interpretation given by the commission in those cases to the act to regulate commerce is now binding, and as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future, at least until Congress has legislated on the subject. We make this concession, because we think we are constrained to do so, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute."

The case at bar falls squarely within this quotation, for this principle of law which has been established by the commission long prior to the time of the indict-

ment, had, prior to the time of the trial, been incorporated into the statute law of the land.

The Interstate Commerce Commission, as shown by the report above cited, has always recognized the right of common carriers to pay for the use of switch tracks and other facilities provided by shippers. The Congress of the United States, having in mind that right, enacted the following clause as a part of the Hepburn act:

> "If the owner of property transported under this act directly or indirectly renders any service connected with such transportation or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable."

The Court of Appeals in its decision affirmed this principle of the law, but declined to bring this case within it. Thus (89):

> "So, if a railroad in discharging its undertakings as an interstate common carrier may lease tracks from another railroad, we perceive no valid reason for denying a railroad the right to lease tracks from a shipper for a like purpose, provided the rental is fair and does not include, by being excessive, a concession from the established transportation rate. * * * The S. & S. tracks were not a part of that highway. They were not used by the Alton in serving the shipping public generally."

This view, we contend, is erroneous and is not in accord with previous adjudications of this court, and the rulings of the Interstate Commerce Commission. As late as November 4, 1907, the Interstate Commerce Commission in the case of *Wolcottka Light & Water Co.* v. *Ft. Smith & Western R. Co.*, speaking

of making allowances *per car* in payment of a switch track, said:

> "Although the payments to be made by the carrier to the shipper under such contracts may properly be determined or based on the number of carload shipments made to or from the industry, such payments ought not to be made out of the rate as each car is moved, but ought to be made out of available funds at the end of definite intervals, say, of six months or a year."

THAT IS JUST EXACTLY WHAT WAS DONE IN THE CASE AT BAR. THE ALLOWANCE WAS NOT MADE AS EACH CAR MOVED, BUT LONG AFTERWARDS THE PETITIONER, CHICAGO & ALTON RAILWAY COMPANY, PAID TO THE S. & S-COMPANY CERTAIN SUMS OF MONEY FOR THE USE OF THIS TRACK, THE AMOUNT OF WHICH WAS BASED UPON THE NUMBER OF CARS HAULED.

IT IS MOST SIGNIFICANT THAT IF THE RULING OF THE INTERSTATE COMMERCE COMMISSION IN THE CASE LAST CITED IS CORRECT, THEN THE PETITIONERS IN THE CASE AT BAR HAVE BEEN FOUND GUILTY AND BRANDED AS CRIMINALS FOR DOING THE VERY THING WHICH HAS BEEN STAMPED WITH APPROVAL BY THE COMMISSION. IT SEEMS ALMOST UNBELIEVABLE THAT ANY CARRIER COMPANY AND ITS OFFICERS SHOULD BE INDICTED AND FOUND GUILTY OF HAVING VIOLATED THE CRIMINAL LAWS OF THE LAND ON A STATE OF FACTS WHICH THE COMMISSION CHARGED WITH THE ENFORCEMENT OF THE LAW SHOULD, BEFORE THE CASE GETS OUT OF THE COURTS, UNQUALIFIEDLY APPROVE. IN THE WELEETKA CASE THE CARRIER PAID FOR THE TRACK ITSELF. IN THE CASE AT BAR THE CARRIERS PAID A SUM EQUAL TO THE INTEREST ON THE COST OF THE TRACK—A DISTINCTION WITHOUT A DIFFERENCE.

The proceeding entitled "*In the matter of allowances to elevators by the Union Pacific Railroad Company*," decided April 9, 1907, is also in point. The decision referred to was the second hearing of the case. The first hearing was reported in 10 I. C. R., 309. The

question in the case was whether it was lawful for the Union Pacific Railroad Company to pay to Peavey & Company, who were shippers over the lines of the Union Pacific Railroad Company, 1¼c per 100 pounds for the "elevation of Peavey & Company's own grain." On page 102 of the decision of April 9, 1907, the comission decided as follows:

> "The vice in the situation at Council Bluffs and Kansas City arises out of the fact that the Peavey interests, besides operating the elevators in question for the railroad company, are also extensive buyers, sellers and shippers of grain. If they were elevator men only, the amount of the allowances paid to them by the railroad company on the grain of other shippers would not have been the occasion of inquiry by the Commission, unless upon complaint by a shipper that the allowances entered into the rates and made them excessive or were being used covertly as a rebate. But being themselves dealers in grain, they perform a service for themselves and for their own grain, although operating the elevators under contract with the railroad company. It is for this reason that we still regard the arrangement as objectionable, *although not necessarily and in itself unlawful.* * * * They are paid by the company for performing an elevation service for its shippers, and the service they render is chiefly in connection with their own grain. * * * The arrangement puts them on a special ground of advantage as buyers and sellers and shippers of grain. It ought, therefore, to be narrowly scrutinized and examined by this Commission, and so rigidly readjusted under our order as to strip it of any possibility of working an injustice to other shippers or of resulting in a breach of the law. * * *"

Continuing the Commission said, on page 103:

> "And therefore, if the allowance involves a profit over and above the actual cost of the ser-

> vice rendered, it becomes, when made to a shipper, a rebate and an unlawful discrimination to the extent of the profit realized. *It is not a rebate when it does not exceed the actual cost.* But to avoid that fundamental objection, the actual cost of the service rendered must be the limit of the allowance."

Applying this language to the case at bar, it is held in the original opinion filed in these cases, that the revenue derived by the S. & S. Company for the use of the switch tracks "measured the true rental value of the tracks." As a matter of fact it was less than the cost of the money invested in the tracks. Their revenue was only fractionally more than 6 per cent. on the capital invested, while in Kansas they could lawfully have received 10 per cent.

See Statutes of Kansas, Sec. 3718.

The decision is squarely in point.

In the case of *The Denaby Main Colliery Company, Limited*, v. *The M. S. & L. Ry. Company*, L. R. 11, App. Cas. 97, substantially the same conclusion was reached by the English courts. In this case there were several different questions involved, only one of which has any importance as applied to the cases at bar. The Colliery Company claimed that the Railway Company had violated Section 2 of the Railway and Canal Traffic Act of 1854. This is the "undue preference" clause of the English act, upon which the same clause in the Interstate Commerce Act of this country was modeled, the provision in each act being substantially the same. The facts were found by a referee, and the legal questions involved having passed through the lower English courts, came to the court of last resort.

The special findings, so far as they are applicable to this case, are to be found on pages 101-102 of the report, and are known as Findings Nos. 8, 9, 10, 11 and 12. From these special findings it appears that Bannister & Josse, the competitors of the Colliery Company, had switch tracks of their own, the use of which enabled the Railway Company to deliver coal consigned for Bannister & Josse at less cost than coal consigned for their competitors. The question in the case was whether or not the construction of the sidings and switch tracks by Bannister & Josse created a difference in the circumstances of such a character that a refund made to Bannister & Josse would not be a discrimination or an undue preference, as prohibited by Section 2 of the Railway and Canal Traffic Act of 1854, which, as above stated, is the same as Paragraph 3 of our Interstate Commerce Act. All of the judges held that the construction by Bannister & Josse of the sidings entitled them to a *difference in the rate* (see pages 112, 115, 122), and that there had not been any discrimination or undue preference.

This case would seem to be an authority clearly in point upon the proposition that the switch tracks constructed by the shipper, thus relieving the railroad company of the same amount of expense, and enabling it to do business on a cheaper basis, entitled the shipper to receive compensation therefor. The case was cited with approval by this court on another point in *Texas & Pacific Railway Co. v. Interstate Commerce Commission*, 162 U. S., 29.

In the light of these facts and of the decisions of this court and of the Interstate Commerce Commission, with

which the decision of the majority of the Court of Appeals is at a variance, and in view of the vast importance which this question has on cases now pending, the petitioners respectfully submit that this court should grant the petition for the writ of certiorari.

Conclusion.

Under all of the laws to regulate commerce now on the statute books involving the health, liberty and property of the people, questions more momentous may not arise than those which the Court of Appeals considered, and which we have here reviewed, viz:

1. May a common carrier acquire, for a reasonable compensation, the right to use and operate an industrial track?

2. Do tracks of industrial companies constitute a part of the highways of commerce under any circumstances and for any purposes?

3. Is property in interstate commerce the moment it begins to *move*, or is *started* on its forward journey?

4. May carriers engaged in commerce among the several states accept considerations other than money in payment of freight charges?

5. May a common carrier doing business in the State of Kansas acquire property in accordance with the laws of that state for right of way and switch tracks?

6. Is the word "point" as used in the acts to regulate commerce, limited to the tracks, switches, sidings and freight houses of one carrier in a great commer-

cial center like Kansas City or Chicago or New York; or is to embrace all the tracks, switches, sidings and freight houses of all carriers within the corporate limits?

7. May a shipper receive a reasonable compensation for services or facilities rendered by him in connection with the transportation of freight.

In this case the decision of the Court of Appeals, as the facts justified, took a wide range. Not only was the Elkins Act construed, but the counsel at the Bar argued the cause in the light of the Cullom Act and the Hepburn Act, and the Court of Appeals, in rendering its decision affirmed the opinion and judgment of the District Court in the light of all the laws to regulate commerce now in force. The decision of the case is, therefore, of great moment and of vast public importance.

In this era of new legislation and uncertainty of the law, the many indictments and convictions which are of constant occurrence in the courts of the United States, the carriers and shippers of the nation are entitled to the decision and judgment of this court on the questions which in this case vitally affect their interests and the liberties of those through whom they act. The petition for the writ of certiorari sets forth seven grounds upon which this court should take the case. If the holdings made by the majority opinion of the Court of Appeals or the concurring opinion of the minority are erroneous or doubtful, certainly this court should hear and determine the case, in order that those holdings, if wrong, may be stricken from the judicial records of the country. Otherwise they will serve as

evil guides. If they are wrong, and stand, and are followed, consequences may ensue of which men may not hitherto have thought. On the other hand, if the holdings of the majority of the Court of Appeals, or any of them, or of the concurring opinion of the minority, are correct and true, it is equally important that this court should hear and determine the case, in order that when carriers and shippers are performing their duties to the public, in the light of those holdings, their safety may be secure.

Assuming that all of the holdings of the Court of Appeals are correct, they are without binding force beyond the particular forum of that court. So that if a common carrier traversing two or more of the judicial circuits of the nation should be indicted for a violation of the Hepburn Act in receiving a *different compensation* than that provided in its published tariffs which, it did, following the decision of the Court of Appeals, the courts of another judicial circuit are in no wise bound by the decision of the Court of Appeals in the case at bar.

In the late case of *Mast Foos & Co.* v. *Stover Manufacturing Company*, 177 U. S., 485, complaint was made of the action of the Circuit Court of Appeals for the Seventh Circuit, in refusing to follow the opinion of the Circuit Court of Appeals for the Eighth Circuit, in a case involving the validity and scope of a patent. This court held that the Circuit Court of Appeals of one circuit was not bound to follow the decision of the Court of Appeals of another circuit. The court said (488):

"Comity is not a rule of law, but one of prac-

tice, convenience and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question. But its obligation is not imperative. If it were, the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle. Comity persuades; but it does not command. It declares not how a case shall be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other co-ordinate tribunals. Clearly it applies only to questions which have been actually decided, and which arose under the same facts."

On the other hand, the Interstate Commerce Commission is a national body and its reports and orders affect the whole nation and the whole people, as fully and completely as the opinions and judgments of this court.

It is indeed a serious matter for these petitioners to be adjudged criminals under the law and to be compelled to pay an enormous fine because of acts which they have always believed to be legal, which have never before been questioned and which, on the contrary, have been stamped with the approval of the Interstate

Commerce Commission. Of course the fact that the legality of what was done had never before been questioned in the courts does not make it lawful, but the novelty of the questions raised and the great divergence of opinion thereon should give great weight to this petition for writ of certiorari.

Apart, however, from the criminal features of the case, there are other reasons equally grave upon which this court should take the case. If any of the rulings made by the judges of the Court of Appeals, or the concurring opinion of the minority thereof, are erroneous, this court should take the case, for if any of those holdings are followed by the shippers and carriers of the nation, there will within a short time be rules and regulations of a fixed nature, which, if then overthrown, will disorganize, for an equal length of time, the operations of the carriers and the shippers, resulting in heavy financial loss. If two or more of those rulings are wrong, the more momentous becomes the situation, because the opinion of the Court of Appeals, established by the majority and minority judges, has decided questions relying upon which the carriers and shippers are daily performing their duties.

Respectfully submitted,

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Office Supreme Court, U. S.
FILED.
OCT 5 1908
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1908.

CHICAGO & ALTON RAILWAY COMPANY, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No. 238.
JOHN N. FAITHORN, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No. 239.
FRED A. WANN, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No. 240.

BRIEF AND ARGUMENT FOR PETITIONERS.

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GUNTHORP-WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1908.

CHICAGO & ALTON RAILWAY COMPANY, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No. 238.
JOHN N. FAITHORN, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No. 239.
FRED A. WANN, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No. 240.

I.

STATEMENT OF THE CASE.

The petitioners were jointly convicted of violating that part of Section 1 of the Elkins Act which inhibits the giving of

> "any rebate * * * in respect to the transportation of any property in interstate or foreign commerce, * * * whereby any such property shall by any device whatever be transported at a less rate than that published and filed." U. S. Comp. Stat., 905, p. 599.

On the trial of the case, all of the evidence received

by the trial court was contained in a written stipulation, which was offered in evidence by the Government as its case. (Rec., 34-40.)

The Government proved that the Chicago & Alton was an interstate common carrier having a line extending eastward from Kansas City, Missouri; that the Kansas City Railway Company was an interstate common carrier between Kansas City, Kansas, and Kansas City, Missouri, having a belt line over which it hauled cars of freight from industries along its tracks to various railroads; that the Schwarzschild & Sulzberger Company (hereinafter called the S. & S. Company), a corporation, owned and operated a meat packing plant at Kansas City, Kansas, adjoining the tracks of the Belt Line; that the S. & S. Company was not a common carrier; that within its plant and running around and between various buildings thereof the S. & S. Company, at a cost of $75,000, had built many years prior to the 1st day of January, 1901, about a mile and a half of tracks, switches and sidings for which the annual outlay for maintenance and taxes was $1,200 in addition to interest on the investment; that the S. & S. Company had the lawful right to own and maintain these tracks; that the S. & S. tracks connected with the Belt Line at the property line; that the Alton Railroad had an arrangement with the Belt Line and with eastern railroads whereby the Alton undertook to transport property in interstate commerce from Kansas City, Kansas, to seaboard cities, that the Alton published and filed schedules of rates for such transportation. That (at the time mentioned in the indictment) the Belt Line published and filed a rate of $3

per car for hauling freight over its line from the S. & S. plant to the Alton; that the Alton transported various carloads of freight for the S. & S. Company from Kansas City, Kansas, to eastern points, collected from the S. & S. Company the full amount of the published rates and paid to the Belt Line $3 per car, which amount was included in the Alton's published rates; that many years prior to the 1st day of January, 1901, the switching tariff of the Belt Line from the plant of the S. & S. Company to the tracks of the Alton Company was $4 per car; that as the Belt Line could not reach the buildings and loading docks of the S. & S. Company without using the tracks and switches constructed and maintained at the expense of that company, it had paid to the S. & S. Company, under an agreement between it and that company, $1 per car for all loaded cars switched by it from the plant over the tracks in question; that no charge or payment had ever been made for empties or incoming cars; that during all of the years prior to the 1st day of January, 1901, the Alton Company had absorbed this switching charge of the Belt Line of $4 per car, and the Belt Line had in turn paid to the S. & S. Company $1 per car; that on or about the 1st day of January, 1901, the S. & S. Company requested the Alton Company to pay to it direct instead of through the medium of the Belt Line the trackage of $1 per car for loaded cars; that this the Alton promised to do; that on January 1, 1901, the Belt Line changed its published switching charge from $4 to $3 per car, and that after that date the Alton Company continued to pay to the Belt Line the sum of $3 per car and paid direct to the S. & S. Company the $1 per car which had previously been paid

through the Belt Line; that the schedules required by the "Interstate Commerce Act" to be kept by the carriers did not state separately or otherwise any charges whatever on account of this trackage; that the shipments with respect to which the rebates charged in the indictment were said to have been made moved in the months of December, 1903, and January, 1904.

The Government further proved that on May 20, 1904, the defendants paid the trackage which had accrued for the preceding months of December and January; that the payment of $1 per car was made by the Alton Company through the petitioners Faithorn, its Vice-President, and Wann, its General Freight Agent.

The two vouchers which were used by the Alton Company in paying for the use of the tracks and were offered in evidence by the government read as follows (Rec., 41, 42):

> "For refund of terminal charges assessed at Kansas City month of January, 1904, 247 cars at $1.00 per car, $247.00.
>
> For refund of terminal charges assessed at Kansas City month of December, 1903, 281 cars at $1.00 per car, $281.00."

The government further proved that the Chicago & Alton Company only carried 32 6/10 per cent. of the entire output of the S. & S. Company; that the Great Western Company carried 15 per cent. of it, and that other competing lines carried 31 4/10 per cent., the balance being carried by non-competing lines; that the total number of loaded cars switched out of the plant of the S. & S. Company from January 1, 1901, to Feb-

ruary 1, 1904, inclusive, was about 19,000 cars (Trans., 39).‡

The stipulation showed that after the cars had been loaded at the dock of the S. & S. Company, the carrier then and there coupled on its engine; that when these cars commenced to move they passed over one continuous and unbroken highway of railroads consisting of tracks and roadbeds as follows: the tracks of the S. & S. Company; thence on the tracks of the Belt Line; thence on the tracks of the Alton line to its terminal connections; thence on to the tracks of connections to the east.

The Alton road owning but a section of this continuous and unbroken highway from Kansas City, Kansas, east, it paid for the use of the tracks and facilities it did not own.

The stipulation further provided that subject to the ruling of the court as to its competency, the defendants should be permitted to introduce evidence on the trial tending to prove what, if any, sum would have been a reasonable charge during the period covered by the indictment for the S. & S. Company to have made for the use of the tracks.

The Government having introduced the stipulation in evidence rested its case and the defendants moved for a peremptory instruction. This was denied.

‡Upon the theory that the S. & S. Company was charging and receiving $1.00 per car for all loaded cars out and no charge for incoming cars, this would have given the S. & S. Company a total revenue during the period of three years and one month of $19,814, or an annual income, in round numbers, of $6,000 on an investment of $75,000, upon which there were annual charges for maintenance and taxation of $1,200. In other words, the net revenue which the S. & S. Company received for the use of its tracks was a small fraction more than 8 per cent. upon the cost of its investment.

Whereupon the defendants offered to prove the reasonable value of the trackage in question at the time mentioned in the indictment. The evidence was ruled out and the jury having returned a verdict, the defendants were fined sixty thousand dollars ($60,000) by the trial judge.

In affirming the judgment (as will more specifically appear) the judges of the Court of Appeals were hopelessly divided both as to the premises which they assumed to be the law and as to the reasoning by which they reached their several conclusions. The major premise assumed by their Honors Judge Baker and Judge Seaman to be correct was diametrically opposed to the law as assumed by His Honor Judge Grosscup to be correct. On the other hand, the course of reasoning which Judge Grosscup adopted in his concurring opinion was clearly contradictory to the reasoning adopted by their Honors Judge Baker and Judge Seaman.

A petition for a rehearing having been duly filed, was taken under advisement and finally denied on the ninth day of October, 1907, and subsequent, as the records of this court show, this court granted a petition for a writ of *certiorari*.

II.

SPECIFICATION OF ERRORS RELIED UPON.

The errors assigned on the record in the Court of Appeals are to be found on pages 56-58 of the record.

*For the convenience of the court, we have had printed as an appendix to this brief the opinion of the United States Circuit Court of Appeals.

In this court the petitioners assign the following errors, which were also assigned in the lower court:

"1. The court erred in refusing to admit on the trial of said cause proper and competent evidence offered on the part of this defendant, to-wit:

Evidence proving that the amount of one dollar per car, referred to in each of the first eight counts of the indictment, was less than the fair and reasonable value of the trackage furnished by the Schwarzschild & Sulzberger Company, and that the sum of one dollar per car referred to in said first eight counts is less than reasonable compensation for the use of said tracks owned, constructed, furnished and maintained by said Schwarzschild & Sulzberger Company.

2. The court erred in improperly refusing to instruct the jury as requested by this defendant in the following particulars, to-wit:

The court instructs the jury to find the defendants and each of them not guilty as to each and every count of said indictment.

3. The verdict of the jury is contrary to the law.

4. The verdict of the jury is contrary to the evidence in the case.

5. The court erred in overruling the defendants' motion for a new trial in said cause."

BRIEF.

I.

INTERSTATE COMMERCE BY RAILROAD BEGAN THE MOMENT THE CARRIER RECEIVED THE FREIGHT MENTIONED IN THE INDICTMENT AT THE LOADING DOCKS OF THE SCHWARZSCHILD & SULZBERGER COMPANY AND BEGAN TO MOVE THE SAME.

The Daniel Ball, 10 Wall., p. 557 (565).

Coe v. *Errol*, 116 U. S., 517.

Kidd v. *Pearson*, 128 U. S., 1 (24).

II.

A RAILROAD COMPANY MAY CONSTRUCT OR ACQUIRE THE RIGHT TO USE SWITCH TRACKS LEADING INTO PRIVATE INDUSTRIAL PLANTS.

Gen. Statutes of the State of Kansas, par. 1341.

Gen. Statutes of the State of Kansas, par. 1382.

Gen. Statutes of the State of Kansas, par. 6468.

Gen. Statutes of the State of Wisconsin, Ed. of 1899, Sec. 1831.

Chicago & Northwestern R. R. Co. v. *Moorehouse*, 87 N. W., 849.

Gen. Statutes of the State of Indiana, Burns Ed. 1901, Sec. 5301.

Gen. Statutes of the State of Missouri, Ed. 1906, Sub. Sec. 2, Sec. 1035.

Constitution of the State of Illinois, Art. 13, Sec. 5.

Hairston v. *Danville & Western Ry. Co.*, 208 U. S., 598.

New Central Coal Co. v. *George Creek Coal & Iron Co.*, 37 Md., 537.

Ex parte Bacot; 50 Am. & Eng. R. R. Cases, 597.

C., B. & N. R. R. Co. v. *Porter*, 46 N. W., p. 75.

St. Louis & San Francisco R. R. Co. v. *Foltz*, 52 Fed., 627.

III.

A DECISION OF THE INTERSTATE COMMERCE COMMISSION WHICH HAS OBTAINED IN LONG PRACTICAL EXECUTION AND HAS BEEN IMPLIEDLY SANCTIONED BY THE RE-ENACTMENT OF THE STATUTE WITHOUT ALTERATION IN THE PARTICULARS CONSTRUED, IS ENTITLED TO THE HIGHEST RESPECT.

N. Y. N. H. & H. R. R. Co. v. *Interstate Commerce Commission*, 200 U. S., p. 361.

IV.

FROM THE INCEPTION OF LEGISLATION ON THE SUBJECT, IT HAS BEEN AND STILL IS LAWFUL FOR AN INTERSTATE CARRIER TO PAY A REASONABLE SUM TO A SHIPPER FOR ANY INSTRUMENTALITY OR SERVICE WHICH THE SHIPPER MIGHT FURNISH IN RESPECT TO THE TRANSPORTATION OF FREIGHT. THE ONLY LIMITATION UPON ITS RIGHT SO TO DO IS THAT THE COMPENSATION SO PAID MUST BE REASONABLE.

Division of Joint Rates, 10th Interstate Commerce Commission Reports, p. 335.

Weleetka Light & Water Co. v. *Fort Smith & Western R. R. Co.*, 12 I. C. R., 503.

Denaby-Main Colliery Co., Ltd., v. *M. S. & L. Ry. Co.*, L. R. 11 App. Cas., 97.

In the Matter of Party Rates, 12 I. C. C., 118.

Hepburn Bill, closing paragraph, Sec. 15.

V.

SWITCH TRACKS CONSTRUCTED BY SHIPPERS AND USED BY CARRIERS ARE EQUIVALENT TO A PRO RATA INCREASE IN TERMINAL FACILITIES OF CARRIER COMPANIES.

IT IS THE LAW BOTH IN ENGLAND AND IN THIS COUNTRY THAT A REASONABLE SUM CAN BE PAID BY A CARRIER COMPANY TO A SHIPPER FOR SUCH FACILITIES.

See authorities point 4, *supra*.

Pidcock & Co. v. *Manchester, Sheffield & Lincolnshire Railway Co.*, 9 Ry. & Canal Traffic Cases, 45.

M. S. & L. Ry. Co. v. *Pidcock & Co.*, 10 Ry. & Canal Traffic Cases, 150.

Tennant & Co. v. *Caledonian Ry. Co. and North British Ry. Co.*, 10 Ry. & Canal Traffic Cases, 194.

Simonds & Son v. *G. W. R.* (Nov. 22, 1900). Summary of case in Vol. 3, Boyle & Waghorn's "The Law Relating to Railway & Canal Traffic," London, 1901.

Vickers, Maxim & Co. v. *Midland Ry. Co.*—*Cannell & Co.* v. *Midland Ry. Co.*, Vol. 17, Times Law Reports, 546. (May 23, 1901.)

VI.

THE INTERSTATE COMMERCE COMMISSION HAS HELD THAT ONE DOLLAR A CAR IS A REASONABLE CHARGE FOR TRACKAGE.

Cattle Raisers' Assn. of Texas v. *Fort Worth Co., etc.*, 7 I. C. R., 513 (552).

VII.

IT HAS LONG BEEN SETTLED THAT IT IS LAWFUL FOR A COMMON CARRIER TO ABSORB TERMINAL CHARGES IN THE NATURE OF SWITCHING AND TRACKAGE, NECESSARY TO MOVE FREIGHT FROM THE POINT OF SHIPMENT TO ITS OWN RAILS.

Cattle Raisers' Assn. of Texas v. *Fort Worth, etc., Co.*, 7 I. C. R., 513 (540-541).

Interstate Commerce Commission v. *C. B. & Q. Ry. Co.*, 186 U. S., p. 320 (336, 337).

VIII.

A REASONABLE SUM PAID BY A CARRIER FOR A SERVICE OR INSTRUMENTALITY WHICH THE CARRIER IS LAWFULLY ENTITLED TO BUY, IS NOT A REBATE.

THE ONLY OFFENSE, IF ANY, WHICH WAS COMMITTED IN THIS CASE WAS A FAILURE ON THE PART OF THE CARRIER TO PUBLISH ITS TERMINAL CHARGE, RULES OR REGULATIONS IN ANY WISE AFFECTING SUCH CHARGES AS REQUIRED BY SECTION 6 OF THE CULLOM ACT.

THAT WHICH IS NOT A REBATE CAN NEVER BE MADE A REBATE BY FAILURE TO PUBLISH.

Central Yellow Pine Assn. v. *V. S. & P. R. R. Co.*, 10 I. C. R., 193 (197, 202).

ARGUMENT.

The judgment of the trial court was affirmed by the Court of Appeals for two reasons:

(1st) It was said that railroad track when constructed and used for the purpose of serving an industrial plant, is a mere plant facility and is not a part of the highways of commerce.

(2nd) It was said that a railroad company has no power to acquire or use such a track, because, it was said, such a track is constructed for a private purpose and not for a public purpose.

In the presentation of this case, we will demonstrate (1st) that neither of these propositions is a correct statement of the law; that on the contrary such railroad track is a part of the highways of commerce and that Interstate carriers have the power to acquire the ownership of or the right to use the same; and (2nd) we will then show that what the petitioners in this case did, was not in any sense of the word the payment of a rebate within the meaning of that word as used in the Interstate Commerce Act.

I.

INTERSTATE COMMERCE BY RAILROAD BEGINS THE INSTANT A CAR LOADED WITH INTERSTATE FREIGHT IS ACCEPTED BY A CARRIER AND BEGINS TO MOVE, AND ALL OF THE TRACKS OVER WHICH SUCH INTERSTATE TRAFFIC MOVES ARE A PART OF THE HIGHWAYS OF COMMERCE.

The question which confronts us at the threshold of this case is: When does interstate commerce begin?

The petitioners contend that interstate commerce began in the case at bar the instant the carrier company attached its engine to the cars at the docks of the S. & S. plant and the car began to move.

In *The Daniel Ball*, 10 Wall., 557, 565, this court, speaking through Mr. Justice Field, said:

> "Whenever a commodity has begun *to move* as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress."

In *Coe* v. *Errol*, 116 U. S., 517, this court, speaking through Mr. Justice Bradley, said (526):

> "The point of time when State jurisdiction over the commodities of commerce begins and ends is not an easy matter to designate or define, *and yet it is highly important both to the shipper and to the State that it should be clearly defined so as to avoid all ambiguity or question.*"

The learned Justice, after observing that goods when *actually started* in the course of transportation to another state, *or delivered to a carrier for such transportation*, are subject to the acts regulating commerce, said (525):

> "There must be a *point* of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that *moment* seems to us to be a legitimate one for this purpose, in which they *commence* their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an *entrepot* for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are *committed to the common carrier for transportation* out of the State to the State of their destination, or have *started* on their ultimate passage to that State."

The learned Justice then states what the court thinks must be the rule on this subject, and that is that the power of taxation on the part of the state holds

> "until they have been shipped or *entered* with a common carrier for transportation to another State, or have been *started* upon such transportation in a continuous route or journey." (527)

After quoting from *The Daniel Ball, supra*, he says (528):

> "But this movement does not begin until the articles have been shipped or *started* for transportation from the one State to the other. * * * Until actually launched on its way to another

> State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain."

In *Kidd* v. *Pearson*, 128 U. S., 1, 24, this court, speaking through Mr. Justice Lamar, cited with approval the above language from *Coe* v. *Errol* and *The Daniel Ball*.

The foregoing authorities are controlling. They establish the fact that the instant the carrier received the freight at the loading docks of the S. & S. Company and began to move the same, the freight became freight in interstate commerce. If, however, at that instant the freight did become freight in interstate commerce, it cannot be denied that the carrier carrying the same had the legal right either to own the tracks in question or to acquire by some means the right to use the same; that for the time being the tracks over which the interstate freight was being carried by an interstate carrier did become part of the highways of interstate commerce and subject to the laws regulating the same. On this point in this case, his Honor, Judge Grosscup, was in entire accord with the previous decisions of this court and with the position for which the petitioners contend.‡

In his concurring opinion he said (Appendix, p. 9):

> "I cannot bring myself to the conclusion that until the cars loaded with the products of the S. & S. Company actually reached the rails of the Terminal Railroad Company, such products were not already in course of interstate transportation —that until the rails of the Terminal Company were reached neither the shipper nor the carrier

‡The reason of his Honor, Judge Grosscup's, opinion is discussed at length on pages 57-62 of this argument.

were subject to the obligations or entitled to the rights that shippers and carriers are subject to and acquire, only when the things to be shipped have reached the stage of being actually in the course of interstate transportation. My personal view is that the moment the products of the S. & S. Company passed out of its hands into the cars of the Terminal Company for transportation, whether the cars thus receiving such products were at the time on the rails belonging to the S. & S. Company or on the rails belonging to the Railroad Company, the interstate transportation of those products had already commenced."

But the majority of the Judges of the Circuit Court of Appeals held against this position. Thus (Appendix, 7):

"It (the Alton Company) had undertaken to carry for all the shipping public a carload of meats from Kansas City, Kansas, to New York, for $20, say. For that purpose it controlled by means of its connections a public highway. The S. & S. tracks were not a part of that highway. They were not used by the Alton in serving the shipping public generally. Their only use was in getting a particular shipper's freight from his own property out to the public highway. * * * Suppose that the S. & S. plant was all under one roof, and the trolleys which convey carcasses and cuts of meat from one department to another were so arranged that the finished product arrived at the property line adjoining the Belt tracks, could the Alton properly make an allowance for the use of the trolleys as instrumentalities furnished by the shippers in the transportation of property in interstate commerce? In our judgment the jury were warranted in finding that the tracks in question were plant facilities, * * * and not instrumentalities for the Alton's use in discharging its duties to the public."

And again, in denying the petition for rehearing (Appendix, 12), the court said:

> "The tracks were S. & S. plant facilities and not instrumentalities for the Alton's use in discharging its duty to the public."

In other words the court held that railroad tracks, used by interstate carriers concededly within the jurisdiction of the Interstate Commerce Commission, engaged in the business of hauling interstate freight to and from a shipper's loading docks in interstate commerce, are not in fact "railroad tracks" but are nothing more or less than hooks and trolleys of the manufacturing business of a shipper.

We are unable to appreciate the distinction which the court apparently made between "plant facilities" and railroad track. If the tracks owned and constructed by the S. & S. Company had in fact been owned and constructed by the Alton Company and had been built by the Alton Company for the sole and only purpose of connecting its main line with the loading docks of the S. & S. Company, they would have served no other or different purpose than in fact they did serve in the case at bar. If the phrase "plant facility" as used by the Court of Appeals in its decision means anything it must mean that "railroad track" when owned and constructed by a shipper, serves a different purpose from "railroad track" when owned or constructed by a carrier, *though in fact it serves but the same purposes.*‡

The question in which not only the petitioners are

‡The legal right and power of the Alton Company to acquire, construct and operate such tracks in Kansas City will be discussed hereafter.

interested, but in which the carriers and shippers throughout the Nation are interested is, do the track and roadbed over which a shipment moves after it is received by the carrier and starts on its journey, constitute a part of the highways of commerce, or is it the law, as stated by the majority opinion, that the car does not strike the highways of commerce until after it has moved a considerable distance on such a journey?

The railroad track in controversy here is not mere plant facilities within the meaning of that phrase, as used by the Court of Appeals, but is in fact and in law a highway of commerce.

If for the purposes of Interstate Commerce, it is not "*railroad* track"; if the freight moving over such rails is not freight in Interstate Commerce, if the equipment, while on such rails, is not equipment in Interstate Commerce; if the train crews, while working on such tracks, are not employed in Interstate Commerce, then, an entirely new limitation is introduced into much of the recent legislation on the subject of Interstate Commerce.

We have, in addition to what is ordinarily known as the Interstate Commerce Act, the laws known as the "*Safety Appliance Act*," the "*Meat Inspection Act*" and the "*Employers Liability Act*." Do none of these acts become applicable either to interstate freight or the equipment, or the employes, until after such freight has moved a considerable portion of its journey and has reached the main line of the trunk line carriers? Are the tracks over which the freight

moves and the equipment used in its transportation not in fact *"railroad"* tracks, and "railroad" equipment, because of the fact that the fee title of the roadbed and rails is vested in "A" rather than "B"?

For the violation of some of these laws fines are assessed. Is it impossible to enforce these laws or assess fines for violation of the law committed during a portion of an interstate movement?

For the injuries received by employes of interstate carriers while engaged in moving interstate commerce, certain rights are awarded. Are these rights innocuous, unless the acts happen on the main line of the road?

Is it a complete defense to say that in a prosecution for the recovery of the fine or the imposition of the penalty or in a suit for the recovery of damages, the tracks where the violations of laws occurred, or the accident happened, was "plant facility" and therefore not subject to the laws regulating interstate commerce?

As illustrative of this point the attention of the court is called to the act generally known as "The Meat Inspection Act," passed by Congress on June 30, 1906, which provides as follows:

> "That on and after October 1, 1906, no person, firm or corporation shall transport or offer for transportation, and no carrier of interstate or foreign commerce shall transport or receive for transportation from one state or territory or the District of Columbia, to any other state or territory or the District of Columbia, or to any place under the jurisdiction of the United States, or to and foreign country, any carcasses or parts there-

> of, meat, or meat food products thereof, which have not been inspected, examined and marked as 'Inspected and Passed,' in accordance with the terms of this act, and with the rules and regulations prescribed by the Secretary of Agriculture."
>
> Ch. 3913, Statutes 1906.

Suppose the cars of the railroad company are set out at the loading docks of the S. & S. Company and after loading are sealed, and carded to some point beyond the State of Kansas, but not examined and marked "Inspected and Passed." These cars, of course, are not to be broken open until they reach their destination. The engine of the interstate belt line hitches on to the cars so loaded, sealed and carded, and proceeds to haul the same over the switch tracks belonging to the S. & S. Company, for the purpose of delivering the same to the Alton Company. As the result of this movement and before the cars have reached the tracks of the Alton Company, suppose that the Belt Line is indicted for receiving for transportation in interstate commerce of meat or meat food products not marked as required by the Act. If in such a case the Belt Line should set up as a defense that the goods had not been received for transportation in interstate commerce and the question of its guilt or innocence was before the court for consideration, could the court reach any other conclusion than that the act had been violated the instant when the engine of the Belt Line began to move the car from the loading docks of the S. & S. Company on its way towards its ultimate destination?

Considered from another point of view the distinction between "plant facility", as that phrase must have

been used by the Court of Appeals, and "railroad track" is equally apparent.

So long as the packing house products of the shipper remained upon the trolleys or hooks and wires constituting the same, they were in the possession of the shipper and under its complete control. In the event of damage the shipper would have sustained the loss. But it is clear that when the carrier company accepted the cars, loaded at the shipper's dock, for the express purpose of transporting them, and did begin to transport the same, that thereupon the responsibility of the shipper therefor terminated. It became *eo instanti* transferred to the carrier company. In other words, it became property in interstate commerce, for which the carrier became responsible until the same was delivered to the consignee.

In conclusion: Upon this phase of the case petitioners respectfully submit that the decisions of this court and the various citations hereinabove made, quite different each from the other but each bearing upon the same point, demonstrate conclusively that interstate commerce begins the instant interstate freight begins to move, and that railroad track used by interstate carriers for the purpose of conveying interstate freight on a part of its interstate journey is something more than so-called "meat hooks and plant facilities"; that it is in fact a highway of commerce controlled by all laws relating to that subject.

II.

AN INTERSTATE CARRIER HAS THE POWER TO ACQUIRE THE OWNERSHIP OF OR THE RIGHT TO USE INDUSTRIAL TRACKS SUCH AS THE TRACKS OF THE S. & S. CO. AND TO PAY A REASONABLE COMPENSATION THEREFOR.

A.

For a generation the Interstate carriers have been owning and operating such tracks. They have either (a) acquired by deed or lease from the industrial companies the right to lay such tracks, and have constructed and used them; or (b), the industrial companies have constructed such switch tracks and the carrier companies have after construction refunded out of the earnings the cost thereof, acquiring in such event the ownership thereof; or (c) the railroad companies, by paying a reasonable sum for the use of such tracks, have acquired the right to use the same.

The tracks of the S. & S. Company were in the State of Kansas. In that state all corporations are formed under one law. Such corporations which include railroad companies, are given the power to

> "hold, purchase, mortgage or otherwise convey such real and personal estate as the purposes of the corporation shall require."
>
> *General Statutes of Kansas* (Par. 1341.)

Such corporations also have power to take and hold such "*voluntary grants of real estate and other property as shall be made to it.*" * * *

General Statutes of Kansas (Par. 1382).

The laws of the state also provide as follows:

> "Any person, upon written permission given by the board, may exercise, in the same manner and to the same extent as is now enjoyed by railroad companies, the right of condemning and appropriating land and laying out and constructing any spur, switch or railroad track thereover, and connecting the same with any railroad already constructed; and the right to use such spur, switch or track shall be public, at rates and on terms and conditions such as the board (referring to the Railroad Commission) shall prescribe, if the parties interested cannot agree." * * *
>
> *General Statutes of Kansas* (Par. 6468).

It is clear that under the laws of Kansas, the acquisition of the ownership of such tracks, or the right to use the same by railroad companies, is not unlawful, but is authorized by the statute.

The local law in this respect is followed without question by the Federal Courts.

> *Hairston* v. *Danville & Western Railway Co.*, 208 U. S., 598.

The rule that prevails in Kansas prevails in many other states.

> *Wisconsin Revised Statutes, edition* 1899, Sec. 1831 A.*
>
> *Burns Annotated Statutes of Indiana*, 1901, Sec. 5301.*
>
> *New Central Coal Co.* v. *Georges Creek Coal & Iron Co.*, 37 Md., 537, (562).

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*The statute is printed at length as Appendix II to this brief.
*This statute is quoted at length as Appendix III of this brief.

Ex parte Bacot (S. C.), 50 A. & E. R. R. cases, 597.

General Statutes of Missouri, Edition 1906, sub-section 2, section 1035.*

In *Chicago & North-Western Ry. Co.* v. *Moorehouse* (Wis.), 87 N. W. Rep., 843 (853), the court said

> "* * * Where lumber industries are important factors in the employment and enrichment of the people, the taking of private property for a railroad for the convenience, in the main, of the proprietors and patrons of an industry of that kind, is deemed a taking of private property for public use. * * * In the early settlement of the country the importance of the general welfare of establishing and maintaining grist mills was such that it was held that the use of the land covered by back water from the milldams was a public use thereof within the meaning of the constitution. * * * The right to declare what shall be deemed a public use is vested primarily in the legislature."

In *C. B. & N. Ry.* v. *Porter* (Minn.), 46 N. W. Rep., 75, the Supreme Court of Minnesota said:

> "The character of the use in the case of a railroad or railroad track, does not depend on the amount of business, or the number of persons who may have occasion to use it, but on the right of the public to the benefit of it." (76.)

It is unnecessary to pursue this inquiry further. The statutory provisions of some of the States may differ from those of the State of Kansas, but we submit that the laws of Kansas considered in the light of the decision of this Court in the *Hairston* case demonstrate that in Kansas a railroad

*This section is quoted at length as Appendix IV of this brief.

company could acquire either the ownership of or the right to use the switch tracks of the S. & S. Company. In this view of the case his Honor, Judge Grosscup, coincided with the position for which we contend. In his concurring opinion he said (App., 10):

> "Now I am inclined strongly to the judgment that through contract with the parties interested the railroad company could, at its own expense, lawfully have laid its own rails up to and along side the S. & S. Company's warehouses, notwithstanding the fact that title to the lands under the rails should remain in the S. & S. Company, or could have leased the rails laid by the S. & S. Company of that company."

But the majority of the Judges held otherwise. They not only held that the railroad track in question was "a mere plant facility," but they also held that a common carrier could not acquire or operate such a track because in their opinion it was constructed for a *private* purpose as distinguished from a *public* purpose; thus (App., 6):

> "The foregoing considerations compel us to the conclusion that the judgment cannot be sustained except by holding that the contract (the right to use) between S. & S. Company and the Alton was illegal and void."

Further they said (App., 7):

> "The trouble in this case, however, comes from the fact that the Alton did not take a lease of the S. & S. tracks for the purpose of discharging its undertakings as an interstate common carrier. It had undertaken to carry for all the shipping public a carload of meats from Kansas City, Kansas, to New York for $20.00 say. For that purpose it controlled by means of its connections a public highway. The S. & S. tracks were not a part of that highway. They were not used by the Alton in

> serving the shipping public generally. Their only use was in getting a particular shipper's freight from his own property out to the public highway."

Finally they said, Appendix 8: The acquisition by the carrier of the switch tracks in question could not have been obtained by condemnation because it would have been for a private purpose, and therefore the land could not have been taken by deed or lease, because by taking a lease (as they said)

> "it could not change a private purpose or use into a public one."

Not only was the guilt or innocence of the parties in the case at bar based upon these premises of the majority of the Court, but for the first time in the history of railroading in this country both the shippers and carriers were told that the use of industrial tracks by interstate carriers was illegal and void and always has been illegal and void.

B.

Let it be assumed, however, for the purpose of argument, that under the laws of Kansas, a railroad company could not have acquired either the ownership of or the right to use such tracks *by condemnation*. Upon this assumption the majority of the court held that because the property could not have been condemned its ownership or the right to use the same could not have been lawfully acquired in any other way whatsoever.

We submit that such a conclusion places a limitation upon the powers of railroad companies which never before existed and cannot be harmonized with various constitutional and statutory enactments.

In Elliott on Railroads, Edition of 1897, Sec. 399, the author says:

> "The authorities with good reason discriminate between the power to acquire property by grant and the power to obtain by the exercise of the right of domain. Statutes conferring the authority to condemn property are, as is well known, strictly construed and their operation is seldom enlarged by implication. Where property is seized by virtue of the eminent domain, it is taken against the owner's will, while in the case of a grant he voluntarily conveys to the company. Property legitimately connected with the purpose of the corporation may be rightfully acquired, although the connection be remote. It is not essential, in case *of purchase*, that the property be immediately connected with the corporate purpose; it is sufficient if it be reasonably necessary to the *convenience* of the company and those dealing with it. They may acquire land by *purchase* for many purposes that *would not be sufficient to warrant the seizure under the right of eminent domain.*"

In connection with the text of the learned author, the attention of the court is respectfully called to Section 5 of Article 13 of the Constitution of the State of Illinois, which reads as follows:

> "All railroad companies receiving and transporting grain in bulk or otherwise, shall deliver the same to any consignee thereof * * * to which it may be consigned, provided such consignee * * * can be reached by any track owned, leased or used, *or which can be used, by such railroad companies;* and all railroad companies shall permit connections to be made with their track, so that any such consignee * * * coal bank or coal yard, may be reached by the cars on said railroad."

Although in Illinois there is no statute providing

for acquisition by condemnation of an industrial track, nevertheless in the constitution of the state we find it clearly intimated that a railroad company may acquire, by lease, the tracks running to such plants, and if it can acquire by lease of course it may pay the rental provided therefor. The same law prevails in the State of Missouri. Section 1113 of the statutes of the state provide that:

> "Every railroad corporation which shall receive any grain in bulk for transportation * * * shall transport and deliver the same to any consignee * * * provided such person * * * can be reached by any track owned, leased or used, or which can be used by such corporation." * * *

As a further illustration of this point, it was held in *St Louis & San Francisco Railroad Company* v. *Foltz*, 52 Fed., 627, that though a foreign railroad corporation had no right to condemn in the State of Arkansas, it could acquire land by grant or deed.

Sufficient has been said to show that a railroad company can do many things by lease or purchase which it has never been empowered to do by condemnation. But the majority opinion proceeded upon the theory that the petitioners were guilty of a crime because it was said that a railroad company could not lawfully acquire the right to use a switch track leading from its right of way to an industrial plant.

As an illustration of what the decision means to the commercial world: an industrial company says to a carrier:

> "We will build a track and switch from your line to our plant and maintain the same provided you will pay us a reasonable sum for the use thereof, or a sum equivalent to the interest charges which

would have been imposed on you if you had built the track."

The carrier agrees and the company builds the track, as has been done in thousands of cases. The arrangement, under the ruling, is illegal and void, and all sums paid therefor are violations of the law and all persons identified therewith, making such payments or receiving the same, are criminals, because the transaction is one which has in view a "*private purpose.*"

Every track running from the right of way of a railroad company into an industrial plant, such as a lumber yard, a brick yard, manufacturing company, mill or mine, is, so far as the interests of the particular mine, plant or organization are concerned, constructed for private purposes. Indeed every shipment made by an individual over the lines of a railroad company is for a private purpose. It is the aggregation of all the private shipments and all the private industries served by a railroad company which changes a railroad company and its instrumentalities from being a private enterprise into a public enterprise. A switch track runs to a coal mine. It does indeed serve the private purpose of the mine, but the coal itself is distributed to thousands of consumers all over the United States. The Great Northern Railroad Company runs its switch track into a lumber camp. So far as the lumber camp is concerned it is for a private purpose, but the lumber is distributed in San Francisco and Philadelphia for the purpose of constructing ships. Thousands of people are interested therein. The switch tracks of the S. & S. Company, it is true, served the needs of that particular plant, but the products thereof were distributed throughout the entire world.

C.

Up to the present time we have been indulging in the presumption made by the Court of Appeals that as between the railroad company and the industrial plant, such switch tracks as were constructed and maintained by the S. & S. Company *were solely for the benefit of the S. & S. Company. But from what has already been suggested it is clear such is not the fact.*

The stipulation in this case shows that the S. & S. tracks were not only used for hauling cars in and out, but also for switching purposes made necessary in handling the business. (Rec., 35.)

Here the trains could be made and broken up; here the cars could be shunted back and forth; here repairs could be made; here in fact were large terminals which were used for the purpose of making and breaking up and distributing the trains. It is a fair presumption that no more trackage was provided than was required for the necessary purposes. If the trackage had not been provided by the S. & S. Company at this point, it would necessarily have imposed upon some railroad company the burden and expense of providing equivalent trackage elsewhere. The tracks of the S. & S. Company were in fact in the nature of a terminal.

IN OTHER WORDS, THE CONSTRUCTION AND MAINTENANCE OF THESE TERMINAL FACILITIES OF THE S. & S. COMPANY AND OF ALL SIMILAR INDUSTRIAL TRACKS WHEREVER THEY MAY BE ARE EQUIVALENT TO A LIKE AMOUNT OF TERMINAL FACILITIES CONSTRUCTED ELSEWHERE BY CARRIER COMPANIES.

The right to use these tracks was a direct financial advantage to the carrier companies, and with great respect the petitioners submit that it is not fair to as-

sume, as the majority of the court does in its opinion, that the tracks in question subserved merely the private purposes of the S. & S. Company. On the contrary while it is true they were built by the S. & S. Company, and maintained by that company, they furnished the means of not only distributing its product to the consumers, but also furnished terminal facilities to the railroad companies using the same. The railroads at Kansas City, as common carriers, were obligated to provide yards and other terminal facilities for all shippers, including S. & S. with its great traffic. Not only were they required to provide team tracks, warehouses and other accommodations for delivering and receiving freight, but space and tracks upon which to perform their own railroad work. To the extent that they obtained from S. & S. the right to use its land and tracks, for a fair and reasonable consideration, they obtained the same for *their own corporate purposes*. Such an arrangement would naturally relieve *pro tanto* the congestion at the main terminals of the roads. From the standpoint of "public policy" arrangements such as the one involved in this case *are to be commended rather than denounced as criminal.*‡

D.

A GRAVE QUESTION OF PUBLIC POLICY INVOLVED.

The question under consideration is one of far more importance than the mere decision as to whether or not the use by the carrier companies of industrial

‡In England this view of the law prevails. The English cases bearing on this point will be referred to at length later in this argument.

tracks is a public use or a private use. The question really is: Will the court say, as was said by the Court of Appeals, that henceforth it is unlawful for railroad companies to acquire the ownership or the right to use lands and tracks apart and distinct from their rights of way?

In approaching the decision of such a question the courts should take into consideration the history of the act and the convenience, both to the shippers and of the carrier companies, and as well of the public at large. As was said in *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S., 197 (211):

> "It could not be readily supposed that Congress intended, when regulating such commerce (referring to interstate commerce), to interfere with and interrupt, much less destroy, sources of trade and commerce already existing, nor to overlook the property rights of those who had invested money in the railroads of the country, nor to disregard the interests of the *consumers, to furnish whom with merchandise is one of the principal objects of all systems of transportation.*"

And, again, on page 218, the court said:

> "As we have already said, it could not be supposed that Congress, in regulating commerce, would intend to forbid or destroy an existing branch of commerce, of value to the common carriers and to the consumers within the United States. Clearly, express language must be used in the act to justify such a supposition."

And, again, at the bottom of page 218:

> "Even in construing the terms of a statute, courts must take notice of the history of legislation, and, out of different possible constructions, select and apply the one that best comports with

the genius of our institutions and, therefore, most likely to have been the construction intended by the law-making power."

Under the arrangements which exist between the carrier companies and the industrial plants, whether lumber yards, or coal yards, or coal mines, or manufacturing companies, not only are the facilities for handling the freight greatly increased, but by means of these industrial tracks industrial plants situated in various localities are enabled to do business on an equal basis. The Commission has held that a flat trackage charge may be made applying *to all* industries within *a given switching district*, regardless of the distances which such industries may be away from the right of way of the carrier company.

Cattle Raisers Ass'n. of Texas v. *Ft. Worth Co.*, 7 I. C. R., 513 (552).

If the decision of the majority of the court is adhered to, these inequalities in location can never again be equalized. The industrial company which has the favored location, to wit, the plant adjacent and continguous to the right of way of the carrier company obtains an advantage which his competitor situated five hundred, or a thousand or fifteen hundred feet away can never obtain. It may almost be said that the owners of the land adjacent to the right of way, will, as the result of this decision, be given a virtual monopoly on switch track facilities. Up to the present time, at least, within *given switching districts*, the railroad companies, either by constructing such switch tracks in the first instance, or by reimbursing the owners of such tracks for their disburse-

ments in connection therewith, or by paying a reasonable sum for the use thereof, have equalized the differences in geographical locations, and have endeavored to place all shippers and all competitors upon a par. Indeed, the very purpose of the Interstate Commerce Act as it was originally passed, and as it has now been amended by the Hepburn Act, is to destroy inequalities and prevent discriminations, but the petitioners respectfully submit that if the decision made by the majority of the court is adhered to, the very purpose of the act will, to a great extent, be destroyed. The industrial development of the country as it existed from the beginning will not only be retarded, but revolutionized.

III.

AN INTERSTATE CARRIER BY ACQUIRING THE RIGHT TO USE SUCH A HIGHWAY OF COMMERCE AND BY PAYING A REASONABLE SUM FOR THE USE THEREOF, DOES NOT COMMIT THE CRIME OF REBATING.

A.

If, as we believe to be the fact, we have successfully demonstrated (a) that railroad track, when used for the transportation of interstate commerce, is something more than mere "plant facility"; and (b) that a common carrier has the power to acquire, use and pay reasonable compensation for the use of such track, it logically follows that the crime of rebating was not committed either by the petitioning company or its two officers.

The absorption of terminal charges by trunk lines

is a practice of long standing, recognized both by the Interstate Commerce Commission and by this court.

In *Cattle Raisers' Association of Texas* v. *Fort Worth Company*, 7th I. C. R., 513, the Commission says (p. 549):

> "The United States Supreme Court said in the *Covington Stock Yards Case* that a freight rate between two termini carries with it the cost of a delivery, and that the carrier is obliged to make such delivery and to provide whatever reasonable facilities may be necessary thereto without the imposition of any further charge. While the Circuit Court of Appeals has held that this language does not apply to and control the present case, it, nevertheless, expresses the general understanding in this country. *Ordinarily the single rate includes all terminal charges.*"

In *Interstate Commerce Commission* v. *C., B. & Q. R. R. Co.*, 186 U. S., 320, this court proceeded on the presumption that in the absence of specific items in the rate covering terminal charges, the through rate would be construed as embracing the terminal charges.

What, in fact, did the petitioners do?

It is clear that they paid to the S. & S. Co. only *reasonable* compensation for the use of the tracks. The Government has never questioned this. Upon the record, the judges of the Circuit Court of Appeals agreed that the Government had failed to prove that any unreasonable sum had been paid for the use of the tracks. Thus, the majority said (App., 5):

> "In this case the presumption must be indulged that the wheelage charge of $1 a car measured the true rental value of the S. & S. tracks."

In his concurring opinion his Honor, Judge Gross-

cup, did not question for an instant but that the compensation was entirely reasonable.

Also there has never been any question in the case but that the money which was paid by the petitioning company and its officials was paid for the use of the tracks in question. Some suggestion was made in the Government's brief, filed in this court in opposition to the petition for the writ of certiorari, that there was nothing in the record to show that the dollar a car paid by the defendants had been paid for the use of the tracks. This suggestion probably grew out of the lack of familiarity of the writer of the Government's brief with the record in the case. It will be remembered that the stipulation of facts was offered in evidence by the Government as a part of its case. Not only did the stipulation recite that the dollar a car had been paid because the carrier companies were unable to reach the loading docks without using the tracks in question (Rec., 37, 38), but, as a matter of fact, the vouchers offered in evidence by the Government recited on their face that the dollar a car had been paid for terminal facilities in Kansas City. There was nothing in the record to justify any inference or conclusion other than that the dollar a car had been paid for the use of the tracks. The case was tried on the theory that the dollar a car was paid for the use of the tracks. The learned trial judge, His Honor, Judge Landis, ruled and instructed the jury on that theory. (Rec., 44, 49.) It was argued by counsel for the petitioners and counsel for the Government before the Court of Appeals and that court decided the case (App., 3) on the theory that the dollar a car was

paid for the use of the tracks and "measured the true rental value" thereof. (App., 2, 3.)

From the beginning, every lawyer connected with the case and every judge participating in the case has proceeded on this theory, and any other suggestion is contrary to its entire history.

These facts being true, the petitioners respectfully submit that there is no legal theory by which these payments, made for this purpose, can be twisted or contorted into the crime of rebating.

The Interstate Commerce Act under which the defendants in this case were indicted, created three separate and distinct offenses:

First. It was made unlawful to fail to publish in the tariffs all the terminal charges;

Second. It was made unlawful to fail to adhere to the tariffs after they were published;

Third. It was made unlawful to pay a rebate concession or discrimination, whereby property was carried at a less rate than that named in the tariffs published and filed.

The defendants were not indicted for a failure to file, as a part of their tariffs, the terminal charges at Kansas City. It is clear that if a carrier, under the Cullom Act, as amended by the Elkins Act, failed to publish a tariff, and notwithstanding such failure, did in fact carry freight for a shipper and received pay therefor, that, by such act the carrier did not commit the crime of rebating. If a carrier did carry freight and receive pay therefor, for which there was no published tariff, it might and still can be indicted for failure to publish the tariff, *but such a*

crime is separate and distinct from the crime of rebating. This must be conceded.

Referring again to the indictment: there was no count in the indictment under which the defendants or any of them were indicted for failure to adhere to the tariffs as published. As a matter of fact, the Alton Company had filed with the Commission, at the time, a tariff under which it proposed to carry the dressed meat products of the S. & S. Company. It did collect the tariff rate named in the tariffs. It is not guilty and it is not charged with being guilty of a failure to adhere to the tariff rate.

The only offenses with which the defendants or any of them were charged, of which they have been found guilty, is the offense of either offering to give or giving a rebate, whereby property was carried at a less rate than that named in the tariffs published and filed by the carrier. The indictment being so framed, it was incumbent upon the Government to prove that the defendants were guilty, as charged, and it was also the legal right of the defendants to be allowed to introduce such evidence as was competent, proving or tending to prove that they were not guilty of the crime as charged.

B.

This brings us to a consideration of the assignments of error:

"The court erred in refusing to admit on the trial competent evidence offered by the defendants"; and

"The court erred in refusing to instruct the jury to find the defendants and each of them not guilty of the offenses charged in the indictment."

In considering this question, it must be remembered that at the time of the indictment in this case, the Hepburn Act had not been passed, and Congress had not then attempted to prohibit a carrier from exchanging transportation for property, as was subsequently done in Paragraph 6 of the Hepburn bill.

In determining whether a payment by the carrier to the shipper is the payment of a rebate within the meaning of the act, it is clear that it is necessary to *consider something more than the mere fact that a payment of some kind has been made to a shipper.*

The Interstate Commerce Commission has long since determined that the mere payment by a carrier to a shipper of a certain sum per car is not in itself proof that a rebate has been paid. That body has distinctly held that it is lawful for such payment to be made, provided it is not in itself unreasonable.

In the proceeding entitled *"In the Matter of Division of Joint Rates and Other Allowances to Terminal Railroads,"* 10 I. C. R., 385, the Commission was investigating a large number of industrial railroads which were controlled and owned by industrial plants which they served. The industrial railroads were receiving large percentages of the through rates, and the profits resulting from these divisions of the rates, through ownership of the stock of the industrial railroads, eventually found its way back into the treasury of the shipper. There were three questions in the case:

(1) Did the fact that the industrial railroad was incorporated make any difference?

(2) Under the circumstances stated, were the industrial companies entitled to any part of the rate?

(3) If so, how much?

On the first of these three questions, the commission ruled as follows:

> "It is urged that all this is simply an arrangement between two connecting railroads, and that there is no negotiation with the shipper and no payment to the shipper. This is mere play upon words. The Illinois Northern Railroad Company and the International Harvester Company are one and the same thing. It is entirely immaterial whether this money goes in the first instance into the treasury of the International Harvester Company or that of its creature, the Illinois Northern Railroad Company. That subterfuges of this sort cannot avail has been often decided, and was affirmed within the year by the Supreme Court of the United States in *Interstate Commerce Commission* v. *Baird*, 194 U. S., 25, *in which it was held that it made no difference whether certain contracts were entered into with a railroad company itself or with a coal company, the stock of which was entirely owned by the railroad company.*" (401.)

In other words, the commission held that it was entirely immaterial, for the purposes of the real question involved, whether there was an independent corporation intervening between the shipper and the carrier or not.

As to the second question, the commission held that the industrial railroads were entitled to a reasonable

sum for the services which they rendered, and that this was true even though the sum so received was in fact a payment to the shipper out of the rate. (See pages 398 to 404, inclusive.)

As to the third question the commission held (p. 404):

> "To the extent that they (the divisions of the rates) exceed a *reasonable* charge for the performance of the service, they are, in our opinion, an unlawful preference in favor of that corporation (the industrial company)."

And proceeding, the commission then fixed what, in their judgment, was *a reasonable* sum which the shipper, through the instrumentality of the railroad which it owned could get out of the rate from the trunk line carrier for the service furnished by the shipper.

This decision was handed down on November 4, 1904, after an investigation extending over the greater portion of the year, and it established and fixed the true rule by which all such transactions as those charged in the indictment are to be determined.

This decision of the Interstate Commerce Commission is entitled to the highest respect by the court. In *New Haven Railroad Co.* v. *Interstate Commerce Commission*, 200 U. S., p. 361, this court, referring to holdings of the Interstate Commerce Commission, said:

> "We concede that the interpretation given by the commission in those cases to the act to regulate commerce is now binding, and as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future, at least un-

> til Congress has legislated on the subject. We make this concession, because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute."

The case at bar falls squarely within this quotation, for this principle of law which had been established by the commission long prior to the time of the indictment, had, after the indictment but prior to the time of the trial, been incorporated into the statute law of the land.

The closing paragraph of Section 15 of the Hepburn Act reads as follows:

> "If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable."

The correct rule by which the trial court in the case at bar should have been controlled in considering this case was: First: Had a repayment been made out of the rate by the carrier to the shipper? Second: If so, was it made as compensation for any facility rendered by the shipper in connection with the transportation of the freight? Third: If so, was it a reasonable compensation for the facility furnished?

But the court ignored this test and squarely held that any payment by the carrier to the shipper, regard-

less of what it was for, was an illegal rebate pure and simple.

Since the passage of the Hepburn Act, the Commission has decided a case almost on all fours with the facts in the case at bar and has given the stamp of its official approval to the very acts for which the petitioners in this case were indicted and found guilty and fined. In November, 1907, in the case of *Welcetka Light & Water Company* v. *Fort Smith & Western R. R. Co.*, No. 12 I. C. R., 503, the water company sought to compel the railroad company to construct a switch-track to its plant. Differences arose about the terms and conditions upon which the railroad company would construct the track. At the hearing the railroad company proposed to complete the connection it had already commenced provided the water company would first advance the cost which had been estimated at the sum of $250. It proposed further, after the connection had been made, to repay to the water company the cost of the switch by making it a definite allowance of two dollars for each car placed upon the switch-track. The Commission made no order, but on the question of allowing a definite amount on each car of freight put upon the switch, said (505):

> "In this connection, it is proper to add that the Commission does not approve the practice of some carriers of repaying advances made by a shipper for the construction of a switch-track by making an allowance to him of a definite amount on each car-load of freight shipped to or from his manufacturing plant. Such an arrangement presents too much the appearance of a purchase of property by the carrier with transportation, which is contrary to the principles of the Act. * * * Although the payments to be made by the carrier

to the shipper under such contracts may properly be determined or based on the number of car-load shipments made to or from the industry, such payments ought not to be made out of the rate as each car is moved, but ought to be made out of available funds at the end of definite intervals, say of six months or a year."

This is exactly what was done in the case at bar. The payment for the use of the track was not made as each car moved, but long afterwards the petitioners paid to the S. & S. Company certain sums of money for the use of this track, the amount of which was based on the number of cars hauled. It is most significant that if the ruling of the Interstate Commerce Commission last cited is correct, then the petitioners in the case at bar have been found guilty and fined and branded as criminals for doing the identical thing which has been approved by the Commission. It seems almost unbelievable that any carrier company and its officers should be indicted and found guilty of having violated the criminal laws of the land on a state of facts which the Commission, charged with the enforcement of the law, should, before the case gets out of the courts, unqualifiedly approve. In the Weleetka case the carrier paid for the track itself, which the Court of Appeals in the case at bar said the carrier had no power to do. In the case at bar the carriers paid a sum equal to the interest on the cost of the track,—a distinction without a difference.

C.

THE ENGLISH CASES.

Reference has already been made in this argument to the fact that terminal switch tracks of the character in question are of the nature of terminal facilities, that they are equivalent to a like amount of terminal facilities constructed elsewhere by one of the carriers.

We have already shown in this argument that prior to the passage of the Hepburn bill and as the law stood at the time when the acts complained of in the indictment occurred, the Interstate Commerce Commission, charged with the enforcement of the law, had held that it was lawful for a trunk line carrier to pay to a shipper a reasonable sum for any instrumentality or facility furnished by it in connection with the transportation of the freight; that this ruling of the Interstate Commerce Commission had been incorporated in express terms into the law of the country by Section 15 of the Hepburn bill. This principle of compensation or financial recognition by the carrier of the instrumentalities furnished by the shipper is in strict accord with the English cases upon the same subject. The statutory law of this country as interpreted by the Commission prior to the passage of the Hepburn Bill, and the express terms of the statute itself since the passage of the Hepburn Bill, differ but slightly from the English acts upon which they were modeled. Section 3 of the Interstate Commerce Act which is, and has for years been known as the undue preference

clause, is substantially the same as Section 2 of the Railway and Canal Traffic Act of 1854 of England.

Texas & Pac. Ry. Co. v. *Interstate Commerce Comm.*, 162 U. S., 197 (222).

Interstate Commerce Commission v. *B. & O. R. R.*, 145 U. S., 263 (284).

Section 2 of the English Act reads as follows:

"* * * No such company (referring to railway companies) shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic in any respect whatsoever. Nor shall any such company subject any particular person or company, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. * * *" Railway & Canal Traffic Act, 1854 (17 and 18 Vict. Cap. 31).

Section 24 of the Railway & Canal Traffic Act of 1888 (51 and 52 Vict. Cap. 25) provides as follows:

"* * * Every railway company shall submit to the Board of Trade a revised classification of merchandise traffic and a revised schedule of maximum rates and charges applicable thereto * * * and shall fully state in such classification and schedule the nature and amounts of all terminal charges proposed to be authorized in respect of each class of traffic, and the circumstances under which such terminal charges are proposed to be made."

Section 55 of the same act provides as follows:

"The term 'undue preference' includes an undue preference or an undue or unreasonable prejudice or disadvantage in any respect in favor of or against any person or particular class of persons, or any particular description of traffic.

The term 'terminal charges' includes charges

in respect of stations, sidings, wharves, depots, warehouses, cranes and other similar matters and any service rendered thereat."

It will thus be seen that on principle there is no substantial difference between the English law and the American law upon this subject. The English cases, therefore, may fairly be construed as being authorities entitled to the highest respect in interpreting the meaning and effect of our own legislation on the same subject. Indeed it is the law as laid down by this court that where English statutes have been adopted in our own legislation the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts or has been received with all the weight of authority.

McDonald v. *Hovey et al.*, 110 U. S., 619.

The case of *Denaby Main Colliery Company* v. *M. S. & L. Ry. Co.*, L. R. 11, App. Cas. 97, is in point. The facts in the case, so far as they are applicable to this case, are to be found on pages 101 and 102 of the report, and are known as findings of the Special Master, numbers 8, 9, 10, 11 and 12. From these special findings it appears that Bannister & Josse, competitors of the Denaby Company, had switch tracks of their own, the use of which enabled the railway company to deliver coal consigned for Bannister & Josse at less cost than that consigned to their competitors. The question in the case was whether or not the construction of the sidings and switch tracks by Bannister & Josse created a difference in the circumstances of such a character that a refund made to Bannister & Josse would not be a discrimination or undue preference as prohibited by Section 2 of the Railway and

Canal Traffic Act of 1854. All of the judges held that the construction by Bannister & Josse of the sidings entitled them to a difference in the rate (pages 112-115, 122), and that there had not been any discrimination or undue preference. This case is an authority in point upon the proposition that the switch tracks constructed by the shipper, thus relieving the railroad company of the same amount of expense and enabling it to do business on a cheaper basis, entitled the shipper to receive compensation. This case was cited with approval on another point by this court in the case of *Texas & Pac. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S., 197 (227).

It was also, on the identical point involved, squarely approved by the Interstate Commerce Commission. *In the matter of Party Rate Tickets*, 12 I. C. R. p., 110, the Commission, after referring to the case with approval, made this statement as to the holding of the English court:

> "The court held that * * * since the cost of the service was less to the defendant when delivering Bannister his coal in his yard the rebate allowed on this account was lawful."

In *Pidcock & Co.* v. *M. S. & L. Ry. Co.*, 9 Ry. & Canal Traffic Cases, 45, Pidcock & Company were the owners of a siding which connected with the railway company at a point about thirty or forty yards from the Retford station of the defendants. The railway company charged Pidcock & Co. the same rate on traffic to and from the siding as that charged to the applicant's competitors who received and delivered traffic at the station. It was held that the applicant company was entitled to a rebate from the rate charged in respect that the railway

company did not provide station accommodations for the applicant as was done for its competitors at Retford station.

In connection with this case, and indeed with all the English cases, it will be observed that the word "rebate" is used to apply as applicable to a refund made by the railroad company to the shipper in payment of an allowance which it was lawful for the shipper to receive. So far as we are advised, there is no statute in which it is made a criminal offense *per se* to pay rebates such as has been incorporated into the law of this country. But as will be hereafter shown it is impossible for a rebate in a criminal sense to be paid when the payment is made in cancellation of a lawful indebtedness or in payment of a facility or instrumentality for which the shipper is lawfully entitled to receive.

In *M. S. & L. Co.* v. *Pidcock & Company*, 10 Ry. & Canal Traffic Cases, 150, the situation was reversed. The railway company made a claim against the shipper for the allowance of a reasonable sum for special services rendered by the railway company in connection with the shipper's private siding. It was held, however, that the railway company being relieved by reason of the construction of the siding at the expense of the shipper, of the cost and expense of providing standing room for trucks, and space for loading and unloading, that the shipper was entitled to an allowance from the railroad company because of the terminal facilities furnished by the shipper.

In *Tennant & Co.* v. *C. Ry. Co. and N. B. Ry. Co.*, 10 Ry. & Canal Traffic Cases, 194, the shippers were the owners of a siding situated immediately north of the

station at Panmure on the joint line of the Caledonian & North British Railway Companies. They made a claim for an allowance on the ground that the rates charged on similar traffic from the two nearest stations where there were no private sidings were the same as those charged to Tennant & Co. The Commission held that the railway company was not entitled to charge the applicants the same rate on the traffic received and delivered at the applicant's private siding as it charged its competitors for traffic received and delivered on sidings provided by the company.

In *Simonds & Son* v. *G. W. Ry. Co., Vol.* 3, Boyle & Waghorn's Law relating to railway and canal traffic, London, 1901, Simonds & Son complained that they were charged the same rate on their traffic, received and delivered on their own private siding as that charged on traffic received and delivered at the nearest station, where the Railway Company performed terminal services and provided station accommodation. The Commission held that the applicants were entitled to a rebate of three pence per ton from the station rate on all traffic handled on their siding.

In *Vickers, Maxim & Co.* v. *Midland Ry. Co.*, 17 T. L. R., 546, the applicants were the owners of a private siding near Sheffield. They made claim for an allowance on the ground that they were charged the same rates as those in force at the Sheffield station. The Commission held that the applicants were entitled to an allowance from this rate.

These are but a few cases selected from the English reports wherein under the statutory law of England as hereinabove quoted, allowances

were either made by the railway company and were held by the Commission not to be an undue preference, or allowances were authorized by the Commission, charged with the enforcement of the act, upon the sole ground that the private sidings of the shipper were an instrumentality for which the shipper was entitled to receive compensation.

This being the law, both in England and in this country, it is quite evident that the judgment in this case cannot be sustained.

It is unnecessary, for the purposes of this point in the case, to consider whether the burden was upon the Government to prove by some evidence that the payments in question were unreasonable; or whether the Government, having proved that the payments were made at all, the burden was upon the petitioners to prove that they were reasonable. We say it is unnecessary for the purposes of this case,—because the court having overruled the motion of the petitioners for a peremptory instruction, the petitioners then tendered in court six competent witnesses who were prepared to testify that the charge of one dollar per loaded car moving over its rails asked by the S. & S. Company, and the payments therefor by the defendants, was *less than reasonable compensation* for the facilities furnished, and His Honor Judge Landis refused to permit the evidence to go to the jury.

What shall be said of such a record? The court not only refused to instruct the jury to find the petitioners not guilty, but it refused to permit the defendants to prove their innocence.

D.

JUDGE GROSSCUP'S OPINION.

In this connection, a consideration of His Honor Judge Grosscup's concurring opinion becomes quite pertinent.

We have already shown that Judge Grosscup (a) agreed with the majority of the court that the amount paid by the Alton Company for the S. & S. trackage was reasonable compensation; (b) that he did not agree with the majority of the court as to when interstate commerce begins, but, on the contrary, held for the position for which the petitioners contend; (c) that he also did not agree with the majority of the court upon the power of the carrier to have either acquired the ownership of the tracks of the S. & S. Company or the right to use the same, and to pay a reasonable compensation therefor, but, on the contrary, held for the position for which the petitioners contend. Being in entire sympathy with the petitioners on these two points, the course of reasoning by which he finally concurred in the conclusion reached by the majority deserves careful analysis.

It was said by his Honor, Judge Grosscup (App., 11):

> "But an arrangement of that kind * * * can not * * * be lawfully based on division of rates * * *."

Again, in his opinion (Appendix 11) he said:

> "* * * While the railroad, through its appropriate department, might lawfully perhaps have leased these rails of the S. & S. Co., paying therefor a reasonable rental, it could not law-

> fully * * * through its traffic department and on the basis of a division of rates (the whole arrangement secret, so far as the published tariff sheets were concerned) have made the arrangement that was offered as a defense to the offense prosecuted."

It would seem from this extract from the opinion that, notwithstanding the amount paid was reasonable, he thought that the petitioners were guilty of rebating (a) because he was of the opinion that the arrangement for the payment of this concededly reasonable sum was based upon "a division of rates," (b) he apparently was of the opinion that compensation which would have been perfectly lawful, if authorized and paid by the "appropriate" department of the carrier company, constituted the crime of rebating, if authorized or paid by the traffic department, and (c) he apparently was of the opinion that there was something in the record which justified the inference on his part or on the part of the jury that in the particular case the "appropriate" department was not cognizant of the transaction.

(1) *As to Judge Grosscup's inference that the amount paid was the division of a rate.* A moment's reflection will demonstrate that in this the learned judge was wrong. The amount paid by the Alton Company to the S. & S. Company was in no sense the division of a rate or a concession from the rate. The S. & S. Company paid the regular rate. It, on the other hand, charged and received a dollar a car for the use of certain tracks which it furnished. It made this charge regardless of where the freight went. It made no difference whether the Alton Com-

pany hauled the freight to St. Louis or to Chicago or to New York as a part of a through trip to England, the S. & S. Company merely received a dollar a car, and the Alton Company collected the rate. The S. & S. Company received a dollar a car for the use of these tracks, whether the freight was hauled one mile or a thousand miles. It did not get it as a division. It received the payment as compensation for something which it owned, and which the carrier had the right to buy or lease. These payments were made out of the treasury of the company, in the regular course of business, the number of cars being used as the basis of arriving at the amount due.

The facility or instrumentality of switching yards or trackage is exactly the same in its nature as is the furnishing by shippers of refrigerator cars or tank cars or other private cars. It has never been claimed in any of the opinions of the courts or of the Interstate Commerce Commission that the allowance to the shippers of reasonable compensation for tank cars constituted a division of a rate.

The division of a rate contemplates a division between the carriers; but the payment for facilities and instrumentalities of commerce such as trackage or car mileage, is an entirely distinct proposition.

Not only is this so, but the payment of rentals for the use of tracks on a per car basis is not and never has been known in railroad parlance as "a division of rates." A division of a rate is a percentage arrangement, and the revenue derived by the parties participating therein depends always upon the gross amount of revenue received from the haul. The rev-

enue derived from the use of tracks on a per car basis is a fixed sum whch has nothing whatever to do with the gross revenue derived from the haul.

But suppose for the purpose of the argument, that we indulge in the assumption that it would be proper to consider in law the fixed absolute sum of a dollar a car as equivalent to the division of a rate on a percentage basis. Can it be said that the payment of the same identical amount becomes a crime when paid on this basis, whereas it would not have been a crime to pay the same on a monthly basis? Is there not some doubt upon this question? It was incumbent upon the Government when it sought to condemn an arrangement which had existed for years to establish very convincingly that the arrangement was criminal. If there was any doubt upon the question, it was the duty of the court *not to legislate*, but to resolve that *doubt* in favor of the defendants.

Are not the plaintiffs in error in this case, which is after all a criminal case, entitled at least to the benefits of the doubt which belong to every individual charged with a crime under the law? As a matter of fact, the contract made by the Alton Company for the use of the S. & S. Company's tracks *was not an exclusive contract*. It could not in the very nature of things have been made upon a fixed sum per month. The loaded cars hauled out over these tracks did not move east over the Alton road *exclusively*. They were carried by all the other carriers competing for the freight. The Alton Company carried only 32.6 of such freight. The Great Western carried 15 per cent., and other

competing lines carried 31.4 per cent. These facts the government proved. (Rec., 34.)

In other words, cars were moved out over these tracks and carried east over the lines of many competing companies. The shipper was entitled to the benefit of the competition of other companies. The tracks being used in common and a great number of cars hauled by a number of companies, there was manifestly only one method by which a charge therefor could be properly assessed, and this was a charge based, not upon a percentage of the rate, but upon a fixed sum, to wit, upon a per car basis.

By this means it was capable of computation to the same extent as if it had been a sum per day, per month or per year.

The petitioners respectfully submit that if, as stated in his Honor, Judge Grosscup's opinion, the company could have leased the tracks from the S. & S. Company and could have paid a reasonable sum for the use thereof, that the method adopted under the facts, was the only method by which that sum could be reasonably fixed.

(2) *As to Judge Grosscup's suggestion (c) that what would have been lawful for the "appropriate" department was criminal for the traffic department, and (d) that the record in this case justified the inference that the "appropriate" department was not cognizant of the transaction:*

We are quite unable to follow the logic of this reasoning.

There is nothing in this record to justify any characterization of the acts of the Alton Company and its

officials as being other than payments made by it for many years as compensation for what it in good faith considered a legal obligation arising out of a lawful contract. Under the stipulation it appears that a dollar a car for the use of these tracks had been paid for many years; that prior to 1901 it had been paid to the Belt Line, which in turn disbursed it. Then, in 1901, the S. & S. Company requested the Alton Company to make the payment to it for the trackage direct. There is nothing in this record to justify the presumption that it was secretly made, or that it was made under disguise or without the full knowledge of the "appropriate" department. On the contrary both of the vouchers bear not only the signatures of the freight agent but also the signature of the vice-president of the company. Before any payments were made thereunder they received the O. K. of the vice-president of the company.

But suppose this was not the fact; there is nothing in the law which imposes a fine upon a corporation because a lawful contract is made through one of its various agencies as distinguished from another. It cannot be that under the law a fine of sixty thousand dollars can be imposed and collected because a lawful arrangement was made through the traffic department of a company rather than through the "appropriate" department. Or, to put it another way, it can not be said that this corporation and these gentlemen, its officers and employes, have become criminals under the law and subject to its penalties because an arrangement which would have been lawful if made *through one of them* has become unlawful because made through *the other of them*.

On this point, weird as it may seem, the majority of the judges of the Court of Appeals were clearly of the opinion that his honor Judge Grosscup was wrong. Thus (App., 5):

> "But again, these plaintiffs in error should not be punished because * * * the contract was made by 'freight agents.'"

With reference, therefore, to the opinion of his Honor, Judge Grosscup, the petitioners respectfully submit that, though his premises are correct, his conclusions do not follow and cannot be sustained.

E.

IF ANY OFFENSE WAS COMMITTED UNDER THE ACT, IT WAS THE OFFENSE OF FAILING TO PUBLISH TERMINAL CHARGES, RULES OR REGULATIONS IN ANY WISE AFFECTING SUCH CHARGES AS REQUIRED BY THE FIRST SECTION OF PARAGRAPH 6 OF THE ACT.

The payments made by the defendants were not the payments, as alleged in the indictment of "rebates of one dollar of the freight rates."

They were payments for value received. The railroad company had just as much right to make the payments to the shipper as if the railroad company had bought meat for its dining cars from the S. & S. Company and had refunded to that company the one dollar per car as payment for the dining car supplies so purchased until the same were fully paid.

The S. & S. Company paid the railroad company, for the sake of illustration, 20 cents per hundred pounds, for carrying its carload freight from Kansas City to Chicago. To move that freight it was necessary for the same during its progress to Chicago to

pass over certain tracks owned by the S. & S. Company, for which the railroad company paid a trackage charge. The payment of the trackage charge had nothing whatever to do with the rate charged for the freight.

Whatever may be said of the transaction it cannot be logically or successfully maintained that the payment made by the petitioners to the S. & S. Company was anything different from compensation which the S. & S. Company had the right to receive, and therefore it was not a rebate within the meaning of the Act whereby property was carried at less than the tariff rate.

It follows therefore

This case should be reversed because the verdict of the jury and the sentence of the court are contrary to the evidence; and

Because the verdict of the jury and the sentence of the court are contrary to the law.

The petitioners submit that there was no evidence in the case at all, even tending to prove that the petitioners were guilty of rebating.

The stipulation in the case contained the following (Trans., 39):

> "It is further stipulated and agreed that the tracks owned and maintained by the Schwarzschild & Sulzberger Company are constructed upon its own property and that it had the lawful right to construct and maintain the same."

This phrase in the stipulation meant something. It is a phrase of wide scope. It involves the right to sell, and the right to lease, and the right to charge for the use of; in other words, the

right to make money out of it, so far as the same was not prohibited by some other positive provision of the law. There was no inhibition of the law prohibiting any of these transactions by the S. & S. Company, saving and excepting the inhibition that it could not through the guise of a charge for them, receive an unreasonable sum.

Before there was any case it was incumbent upon the Government to make the next step and prove that the incident of ownership, to-wit, the right to make a charge for the use thereof, had been abused. This the Government did not do. On the contrary, every inference which can be drawn from the facts which the Government did prove is that the charge made was reasonable; and if it was reasonable, then there is no case and the verdict and sentence are clearly contrary to the evidence.

If the verdict and sentence of the court are contrary to the evidence, they are equally contrary to the law. As has been observed, the defendants were charged with rebating. The proof shows that if they are guilty of anything, they could only be guilty of failing to publish

> "terminal charges or * * * rules or regulations which in any wise change, affect or determine any part or the aggregate of such * * * charges."
>
> Cullom Act, Sec. 6.

As said in *Central Yellow Pine Association* v. *V. V. S. & P. R. R. Co.*, 10 I. C. R., in a case quite similar (page 202):

> "The provision of the act, if any, which is violated in this case, would seem to be the requirement that carriers shall publish their rates and

adhere to such rates when published. This was apparently the law under the sixth section of the original act. It certainly is, according to the amendment approved February 19, 1903. This amendment, commonly known as the Elkins Law makes failure upon the part of common carriers subject to the act to file and publish their rates for the transportation of freight, and to strictly observe those tariffs, a misdemeanor punishable by heavy penalty."

It is unnecessary for the purpose of this case to discuss at this time whether the trackage charge paid to the S. & S. Company for the use of the tracks is or was a "terminal charge" or regulation within the meaning of paragraph 6 of the Interstate Commerce Act, or whether that phrase is not limited to terminal charges assessed by the carrier making the rate, and does not include trackage charges of persons, firms or corporations over whose rails freight may pass while *en route*. Those questions are not in this case. They have never been in the case. The petitioners do not by anything that is said herein concede that the trackage in question was such a terminal charge, or that the Interstate Commerce Act required a carrier to publish with the commission such trackage, if any, as it paid in order to complete the through transportation. Those provisions of the act have been referred to solely because, regardless of how they might be construed if involved, the defendants are clearly not guilty of the crime of rebating as charged in the indictment. As illustration, suppose that the indictment had been framed under the law as amended by the Hepburn bill (which was in force at the time of the trial), and the defend-

ants had committed the same acts which they concededly committed in the case at bar, and had been charged with the same crime, to-wit, rebating. It is clear that under Section 15 of the act, they would not have been guilty of the crime charged. At the same time, they might have been guilty of violating the provisions of the act with respect to the publication of terminal charges and the adherence to the rates as published.

It is no more than proper to suggest to the court that it is now too late, in connection with the railroad business of this country, to say that it is illegal for trunk line carriers to absorb terminal charges beyond the rails of the trunk line. It is a part of the railroad business of this country. It may be illegal not to publish the fact that such charges are absorbed, but it is certainly not illegal to absorb them. The difference between the illegality of absorbing a terminal charge and the illegality of failing to publish the fact that such terminal charge is absorbed is as marked as the difference between day and night. If they are published, it is concededly legal to absorb them. If they are not published, the absorption is still legal, but the failure to publish them is punishable. In this case the petitioners absorbed a reasonable terminal charge, which was legal. It may have been such a terminal charge as was required to be published under the Act. If so, the failure to publish the terminal charge was illegal, *but the failure to publish did not make the absorption a rebate.*

Put in other language:

THAT WHICH IS NOT A REBATE CAN NEVER BE MADE A REBATE BECAUSE IT IS NOT PUBLISHED.

In order to sustain the imposition of the fine in this case, it is respectfully submitted that it was necessary for the Government to maintain that every violation by a carrier of the Interstate Commerce Act with respect to its tariffs creates the crime of rebating. But as a matter of fact, the act creates many new offenses which are not necessarily connected. In fact, they are altogether separate and distinct. We submit again that that which is *not* a rebate can never be made a rebate because it *is not published.*

Not only are the two offenses, to-wit, the offense of rebating and the offense of failure to publish, separate and distinct offenses by the terms of the Act, but the punishments are also separate and distinct. The defendants were guilty of rebating if guilty at all, every time the trackage was paid to the shipper, but for a failure to publish they were guilty once and once only, until a new rate was put into effect. In other words, if the Chicago & Alton Company in the case at bar had been indicted for failure to publish its terminal charges, and had been found guilty, it could not in any event have been assessed a fine larger than $20,000, whereas, being charged with rebating, and being found guilty of two separate and distinct offenses, it was liable to be fined for each offense, and was in fact fined the sum of $40,000.

The fact is that the defendants were charged with one crime the gist of which, as a matter of law, was entirely different from any crime of which they might

possibly have been found guilty under the admitted evidence, and for these reasons the defendants respectfully submit that under the indictment as framed, the verdict and sentence of the court are entirely contrary to the law.

IV.

CONCLUSION.

Upon the trial of this case the Government seemed to rely entirely upon the case of *Wight* v. *United States*, 167 U. S., 512. This was a proceeding wherein Wight was indicted for violating Section 2 of the Interstate Commerce Act prohibiting *unjust discrimination between competing shippers.* The act provided that

> "if any common carrier * * * shall * * * collect * * * a greater or less compensation for any services rendered, or to be rendered, in the transportation of passengers or property * * * than it * * * collects or receives from any other person * * * for doing * * * a like and contemporaneous service * * * under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

The facts in the case were that Wolf and Bruening were competing beer dealers in Pittsburgh, who bought their beer in Cincinnati. The rate from Cincinnati to Pittsburgh was fifteen cents a hundred. Bruening had a siding in Pittsburgh, upon the lines of the Pennsylvania Company. Wolf was not located on the

line of any railroad company. Wight, the manager of the B. & O. Company, wanted Bruening's business, but as Bruening would have had to cart his beer to his warehouse from the B. & O. line, whereas it cost him nothing in addition to the rate over the Pennsylvania lines, Wight agreed to reimburse Bruening for the cost of the cartage from the B. & O. station to his warehouse. This cartage amounted to three and a half cents per hundred pounds. Wolf insisted that if the B. & O. Company reimbursed Bruening for his cartage, it should also reimburse him (Wolf) the same amount. This Wight refused to do, and he was indicted for discrimination and found guilty.

We did not see on the trial, and we do not see now, any possible similarity between the Wight case and the case at bar. In the Wight case the only question was one of discrimination between shippers. In the case at bar there is no discrimination alleged or proved. The question of discrimination between the S. & S. Company and other shippers is not raised in the case.

Whether the payment of an allowance amounts to a discrimination as between shippers, or to a rebate in a criminal sense regardless of discrimination, is an entirely different question. It is easily conceivable that a common carrier could be guilty of discrimination, and in no sense of the word violate the law in respect of rebating.

On the other hand, it is equally conceivable that a common carrier could be guilty of rebating and in no sense of the word be guilty of discrimination.

In the Wight case *publication* of the arrangement

with Wolf would not have cleared the defendant of the crime of discrimination. In the case at bar *failure to publish* does not make the defendant guilty of rebating.

The question at bar is, not whether the defendants did or did not treat other shippers similarly situated in the same manner, but,—Were the defendants guilty of the crime charged in the indictment, to-wit, the payment of a rebate? The Wight case has no bearing upon the subject whatsoever.

Using the word "rebate" in a broad and liberal sense, any refund or payment by the carrier to a shipper is a rebate. But when it comes to the definition of that word when used in a criminal statute the petitioners submit that the payment by the carrier to a shipper or any other person of a *bona fide* indebtedness due from the carrier for property or facilities furnished was not and is not a rebate under the Elkins Act. We have already demonstrated that the contract between the Alton Company and the shipper was not prohibited by law. Indeed, this court has stamped with its approval absorption of drayage. Even cartage may be absorbed.

In *Interstate Commerce Commission* v. *Detroit & Grand Haven Railway*, 167 U. S., 633, this Court held that the payment by a railroad company of cartage between its station and the warehouses of the shippers at destination was not illegal, although the same railroad company refused to pay such cartage at other stations. The court said (646):

> "In a matter of this kind much should be left to the judgment of the Commission, and should

it direct by a general order that railway companies should thereafter regard cartage when furnished free as one of the terminal charges and include it in their schedules, such an order might be regarded as a reasonable exercise of the Commission's powers."

In other words, this court has held that the payment of cartage by the carrier at the end of the transportation is legal, provided it is published, or is generally known. The distinction, if any, which can be drawn between cartage at the end of the transportation and at the inception of the transportation is, to put it mildly, somewhat elusive. If legal at the end, it is legal at the beginning, provided it is published; but here again rises the point, if not published (assuming there is no discrimination), the crime of the failure to publish may have been committed but the crime of "rebating" has not been committed.

To go back to the beginning, car mileage is an instrumentality of transportation; cartage may be such a facility or instrumentality; refrigeration may be such a facility or instrumentality; and, as was the fact in the case at bar, yardage and trackage are facilities and instrumentalities connected with transportation which carriers may acquire from shippers and for which they may *pay a reasonable sum*.

Although the Interstate Commerce Act has been in force since 1887, and the railroad companies have either owned or acquired by some form of contract, the right to use and have used industrial tracks continuously since that time, this is the first suit in which their right to acquire either ownership or the privilege of using such tracks has ever been questioned,

either by the prosecuting department of the Government or by the courts.

Of course, the fact that the right to operate or own industrial tracks has never before been questioned does not make the action of the petitioners in this case lawful. On the other hand, it is a serious matter for them to be adjudged criminals under the law, and to be compelled to pay an enormous fine because of acts which they have always believed to be legal—which have never before been questioned and which have in substance been actually approved by the Interstate Commerce Commission. Indeed a crime ought not to be fastened upon anyone who has done innocently some thing which was not clearly defined as criminal.

Whether it be said that the verdict in the case at bar was contrary to the law; or that the verdict is contrary to the evidence; or that the court erred in refusing to instruct the jury to find the defendants not guilty; or whether it be said that the court erred in refusing to admit competent evidence offered by the defendants, the whole question resolves itself into this: Did the S. & S. Company have a right to charge for the use of the tracks which they maintained? and if so, did they charge and were they paid a reasonable sum? The stipulation admits that they had a right to own the tracks. The right to charge therefor naturally follows. The Interstate Commerce Commission has held in the cases above cited that they had the right to make a charge, provided it was reasonable.

The petitioners insist, (1) that the evidence fails to show that the charge was unreasonable; (2) that

the only inference which can be drawn from the evidence admitted is that the charge was reasonable; and (3) that if this is not a justifiable inference from the evidence admitted, that then they should have been allowed to prove that the charge made for the use of the tracks was less than reasonable compensation; and to this contention it is respectfully submitted no successful answer can be made.

As a matter of fact, the questions in this case would never have arisen if it had not been for the fact that the recipient of the trackage in question also happened to be the shipper of the freight. It is not going too far to say that if the trackage in question had been paid to some person other than the shipper, the Government would never have presented the evidence in question for the consideration of the grand jury. But, as has been shown time and again, so long as the sum paid was only reasonable compensation for the instrumentalities furnished, the fact that it happened to be paid to the shipper has no bearing on the case whatsoever.

The petitioners respectfully submit that the judgments should be reversed and the causes remanded for a new trial.

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APPENDIX.

OPINION OF THE CIRCUIT COURT OF APPEALS.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

Nos. 1303, 1304, 1305.

October Term, A. D. 1906.

January Session, A. D. 1907.

The Chicago & Alton Railway Company,
Plaintiff in Error,
vs.
United States of America,

John H. Faithorn,
Plaintiff in Error,
vs.
United States of America,

Fred A. Wann,
Plaintiff in Error,
vs.
United States of America.

} Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

Before GROSSCUP, BAKER AND SEAMAN, *Circuit Judges:*

The case is stated in the opinion.

BAKER, *Circuit Judge*, delivered the opinion of the court:

Plaintiffs in error were jointly convicted of violating that part of section 1 of the Elkins Act which inhibits the giving of "any rebate * * * in re-

spect of the transportation of any property in interstate or foreign commerce * * * whereby any such property shall by any device whatever be transported at a less rate than that published and filed." U. S. Comp. St., Sup. 1905, p. 599.

The government proved that the Chicago & Alton was an interstate common carrier, having a line extending eastward from Kansas City, Missouri; that the Kansas City Railway Company was an interstate common carrier between Kansas City, Kansas, and Kansas City, Missouri, having a belt line over which it hauled cars of freight from industries along its tracks to various railroads; that the Schwarzschild & Sulzberger Company, a corporation, owned and operated a meat packing plant at Kansas City, Kansas, adjoining the tracks of the Belt Line; that the S. & S. Co. was not a common carrier; that within its plant, and running around and between various buildings thereof, the S. & S. Co. at a cost of $75,000 built about a mile and a half of tracks, switches and sidings, on which the annual outlay for maintenance and taxes was $1,200; that the S. & S. tracks connected with the Belt Line tracks at the property line; that the Alton had arrangements with the Belt Line and with eastern railroads whereby the Alton undertook to transport property in interstate commerce from Kansas City, Kansas, to seaboard cities; that the Alton published and filed schedules of rates for such transportation; that the Belt Line published and filed a rate of $3 a car for hauling cars of freight over its line from the S. & S. plant to the Alton; that the Alton transported various carloads of freight for the S. & S. Co. from Kansas City, Kansas, to eastern

points, collected from the S. & S. Co. to the full amount of the published rates, and paid to the Belt Line $3 a car, which amount was included in the Alton's published rates; and that the Alton, through plaintiffs in error Faithorn as vice-president and Wann as general freight agent, paid back to the S. & S. Co., under book-entries of "refund of terminal charges," $1 on each car for the use made of the S. & S. tracks in getting the S. & S. Co.'s cars of freight out upon the Belt Line's tracks.

At the conclusion of the government's evidence plaintiffs in error moved that the jury be directed to return a verdict of not guilty. This motion was overruled. Thereupon plaintiffs in error offered to prove that the use of the S. & S. tracks was reasonably worth $1 a car. The court excluded the proffered evidence.

These adverse rulings present but a single question. If the fact that the S. & S. Co.'s charge for the use of its tracks was reasonable would take the case out from under the statute, the burden would lie upon the government, in order to bring the case within the statute, to prove that the charge was unreasonable; and this the government did not attempt to do. So the assignments of error center on the challenge of the sufficiency of the government's evidence to sustain the verdict of guilty.

Some discussion in briefs and in oral argument was had over the fact that the arrangement between the Alton and the S. & S. Co. was not published and filed with the Interstate Commerce Commission. The S. & S. Co. was not a common carrier, and therefore had nothing in the way of rates and charges to pub-

lish and file with the Commission. Shippers of course were interested to learn from the Alton's published schedules not only the rates between different points but also the terminal charges, if any, that were to be exacted of them in addition to the rates. We think it is clear that the shipping public were not concerned in what part of an Alton through rate was paid by the Alton to the New York Central or to any owner of tracks that were used in making the through shipment. But if divisions of rates or track rentals were required to be published, we think it is equally clear that a failure to publish could not make a rebate of what is not a rebate, and on the other hand that publication could not save what is a rebate from being found to be a rebate. So the aforesaid matter of publication has nothing to do with the case.

Payment by the Alton to the S. & S. Co. was in the guise of a "refund of terminal charges," as though the Alton through oversight had collected more than the lawful charges and was rectifying the mistake. But as courts rightly are keen to penetrate an innocent appearing device to reach an illegal transaction, they should also be alert to save a lawful act though it be hid under a false cover. These plaintiffs in error should not be punished for methods of bookkeeping if the false entries represented in fact a lawful arrangement.

The real transaction was the payment by the Alton for the use of the S. & S. tracks in getting S. & S. freight out of the plant to the Belt Line. The consideration was not based on a fixed monthly or yearly rental, or on a percentage of the investment, but was determined by the amount of use

measured by wheelage. But rentals on the basis of wheelage are unobjectionable if the parties have entered into a contract which in all other respects is lawful.

This contract was made on the Alton's part through its traffic department. We may know as a matter of common information that contracts respecting right of way, roadbed and track are usually made through the engineering or maintenance of ways department, and not through freight agents. But again, these plaintiffs in error should not be punished because the rental was measured by wheelage or because the contract was made by freight agents.

S. & S. received back a part of the money they paid the Alton for freight. That fact alone does not prove that the transaction constituted a rebate within the definition of the statute. A railroad may pay its lawful indebtedness to a shipper out of the money the shipper pays it for freight; or a shipper may pay the full freight partially in money and partially in canceled legal demands against the railroad. The statute's definition of a rebate is any device whereby any property in interstate or foreign commerce is transported at a less rate than that published and filed. So if the full rate be paid either in money or in money's worth, the parties can not be guilty of rebating. Of course the money's worth part of the payment might itself be used as a device whereby the property would be carried in interstate commerce at less than the published rate; but in this case the presumption must be indulged that the wheelage charge of $1 a car measured the true rental value of the S. & S. tracks.

The foregoing considerations compel us to the conclusion that the judgment can not be sustained except by holding that the contract between S. & S. Co. and the Alton was illegal and void.

The use that the contract provided for was the use that was made in hauling S. & S. freight from inside of the S. & S. plant out to the S. & S. property line, so that there it might be put on the Belt Line's track, which in these through routings is to be taken as a part of the Alton system. Plaintiffs in error defend the arrangement on the ground that an interstate common carrier has the right to pay a shipper a just allowance for the use of any instrumentality furnished to the carrier by the shipper in connection with the transportation of the shipper's property. And attention is called to the closing paragraph of section 15 of the recent Hepburn Act as being declaratory of the law as it stood when the contract now in question was made: "If the owner of property transported under this act directly or indirectly renders any service connected with such transportation or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable." It never has been unlawful for a railroad to lease cars from a shipper, like the Armour Co., any more than from a builder of cars, like the Pullman Co. But if cars are leased from a shipper, not only the Hepburn Act but also the Cullom and the Elkins Acts, as we regard them, prohibit the extension of favors to the shipper in the way of freight rates under cover of the lease. So, if a railroad in discharging its undertakings as an interstate common carrier may lease tracks from another railroad, we perceive no valid rea-

son for denying a railroad the right to lease tracks from a shipper for a like purpose, provided the rental is fair and does not include, by being excessive, a concession from the established transportation rates. The trouble in this case, however, comes from the fact that the Alton did not take a lease of the S. & S. tracks for the purpose of discharging its undertakings as an interstate common carrier. It had undertaken to carry for all the shipping public a carload of meats from Kansas City, Kansas, to New York for $20, say. For that purpose it controlled, by means of its connections, a public highway. The S. & S. tracks were not a part of that highway. They were not used by the Alton in serving the shipping public generally. Their only use was in getting a particular shipper's freight from his own property out to the public highway. Suppose that the S. & S. Co., instead of ties and rails, had put down a paved roadway on its land, and that the Alton, in addition to the twenty dollars' worth of transportation it was giving to other shippers, furnished horses and wagons to haul the meats from the packing rooms to the Belt Line, would it be contended that the Alton could lawfuly still further pay the S. & S. Co. for the use of the pavement? Or suppose that the S. & S. plant was all under one roof and that the trolleys which convey carcasses and cuts of meat from one department to another were so arranged that the finished product arrived at the property line adjoining the Belt tracks, could the Alton properly make an allowance for the use of the trolleys as instrumentalities furnished by the shipper in the transportation of property in interstate commerce? In our judgment, the jury were warranted in finding that the

tracks in question were plant facilities, as clearly as the supposititious pavement and trolleys would be plant facilities, and not instrumentalities for the Alton's use in discharging its duties to the public. Wherever the Alton needed tracks for that purpose, it could acquire the land by exercising the sovereign power of eminent domain which had been conferred upon it by the people. But manifestly the Alton could not condemn the S. & S. tracks for the sole purpose of hauling the S. & S. Co.'s product from its warehouse to the Alton's public highway, because that would be a private purpose. Whatever property the Alton could condemn, it could acquire by deed or lease; but by taking a lease it could not change a private purpose or use into a public one. The lease of these plant facilities was therefore a device whereby the property of the S. & S. Co. was transported at $19 a car while other shippers were paying $20.

This case is ruled in principle, we believe, by the decision in *Wight* v. *United States*, 167 U. S., 512, that an arrangement whereby a particular shipper was allowed to offset against his freight bills the true value of the use of his teams in hauling the property from the railroad to his warehouse was a discrimination against other shippers of the same class of property in the same city who were compelled to pay the freight in full. It is contended that the citation is inapplicable because the question there was of discrimination and here of rebate. Under the Cullom Act the standard of comparison was the treatment of other shippers; it was necessary to prove not only that the favored shipper really paid less than the published rate but also that other shippers paid the full rate or a

greater rate than that of the favored shipper. Under the Elkins Act the standard of comparison is the published rate; it is only necessary to prove that the favored shipper has had his property transported at a less rate than that published and filed. Both acts were aimed to kill favoritism, and the favoritism in the Wight case was of the same kind and effect as in this. The big manufacturer or dealer has all the advantage over his small competitor that he is legally or morally entitled to in his savings of labor cost and in buying his materials at greater discounts. The application of the maxims of merchandising to railroading was always counter to the common law pact between the railroads and the people. But it was not until the government as *parens patriae* was authorized to represent the scattered and unorganized sufferers from favoritism that any hope appeared of taking the railroad business out of the realm of private barter.

We exclude from the case, as not being within the issues, any question of the right of a railroad to render greater service or to furnish more facilities for one shipper than another for the same published charge. The issue here is the right to furnish the same or more at a less price.

GROSSCUP, *Circuit Judge*, Concurring:

I cannot bring myself to the conclusion that until the cars loaded with the products of the S. & S. Company actually reached the rails of the Terminal Railroad Company, such products were not already in course of interstate transportation—that until the rails of the Terminal Company were reached, neither the shipper nor carrier were subject to the obligations, or

entitled to the rights, that shippers and carriers are subject to, and acquire, only when the things to be shipped have reached the stage of being actually in course of interstate transportation. My personal view is that the moment the products of the S. & S. Company passed out of its hands into the cars of the Terminal Company for transportation, whether the cars thus receiving such products were at the time on the rails belonging to the S. & S. Company, or on the rails belonging to the Railroad Company, the interstate transportation of those products had already commenced; and that the published rate is a rate for the whole of that transportation, from the moment it thus begins to the moment the goods reach their destination; from which it follows, it seems to me, that as against the S. & S. Company, notwithstanding the fact that the Railroad Company receives the goods at the S. & S. Company warehouses, and on its rails (no additional terminal charges having been fixed) the Railroad Company could not lawfully exact more than the regular published rates; while in the performance of its obligations to other shippers, under the Interstate Commerce law, it could not lawfully accept less. In other words, under the facts presented, the published rate is not affected by the fact that the cars were loaded at the S. & S. Company's warehouses, and not on the Company's rails—such place of loading being, along with the Railroad Company's freight stations, "Kansas City" within the meaning of the published rates.

Now I am inclined strongly to the judgment that through contract with the parties interested, the Railroad Company could, at its own expense, lawfully have

laid its own rails up to and along side of the S. & S. Company's warehouses, notwithstanding the fact that title to the land under the rails should remain in the S. & S. Company; or could have leased the rails laid by the S.&S. Company of that company; provided always that the transaction was not a subterfuge to cover up discriminations. But an arrangement of that kind between the two companies cannot, in my judgment, for reasons of public policy that the Interstate Commerce Act was intended to carry out, be lawfully based on division of rates, or in any other way be connected with, or affect, the rate making function of the Railroad Company; for to secure equality among shippers, the law commands, not only that the rates shall be equal, but that they shall be fixed and certain—subject to no addition or diminution against, or in favor of, any one —so fixed and certain that any shipper can with his head and pencil figure out from the tariff sheets just what the rate is, both for himself and for his competitors; from which it follows that, while the Railroad Company, through its appropriate department, might lawfully perhaps have leased these rails of the S. & S. Company, paying therefor a reasonable rental, it could not lawfully, for the reasons of public policy named, through its tariff department, and on the basis of a division of rates (the whole arrangement secret so far as the published tariff sheets were concerned) have made the arrangement that was offered as a defense to the offense prosecuted.

The judgment is AFFIRMED.

OCTOBER TERM, 1907. OCTOBER SESSION, 1907.

ON PETITION FOR REHEARING.

Before GROSSCUP, BAKER AND SEAMAN, *Circuit Judges:*

Per Curiam: The burden of the argument in support of the petition is that the opinion of the court promulgates the doctrine that it is unlawful "for a railroad company to acquire by lease or purchase or other contract the ownership or the right to use a track leading from its right of way to an industrial plant." The facts of the case do not require the affirmance of such a proposition; and we disclaim the inference which counsel draw from the language of the opinion. We do not elaborate because we believe that counsel on reading the opinion anew will have no difficulty in understanding that our judgment of the character of the Alton's dominion over the S. & S. tracks was founded on our view that the evidence warranted the jury in finding that "the tracks were S. & S. plant facilities and not instrumentalities for the Alton's use in discharging its duties to the public."

The petition is overruled.

APPENDIX II.

Section 1831a of the Statutes for the State of Wisconsin for the year 1899 reads as follows:

> "Every railway company existing in whole or in part under any law of this state and operating a railway therein may build, maintain and operate branches and spur tracks from its road or any branch thereof to and upon the grounds of any

mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock or other industry or enterprise; * * * and may acquire by purchase or condemnation in the manner provided in this chapter for the acquisition of real estate for railway purposes other than for its main track all necessary roadways and rights of way for such branches, spur tracks," etc.

APPENDIX I I I.

Section 5301 of Burns' Annotated Statutes of the State of Indiana for the year 1901 reads as follows:

"Any railroad company organized under the laws of this state is hereby authorized to build and operate in addition to the main line authorized by its charter or articles of association, branch railroads from any point or points on its main line to or through any adjacent mineral lands, containing coal, iron or building stone, not, however, exceeding a distance of fifty miles from the nearest point on said main line."

APPENDIX I V.

Sub-section 2 of Section 1035 of the General Statutes of the State of Minnesota for the year 1906 reads as follows:

"Any railroad company organized under the laws of this state or under the laws of any other state, a portion of whose line of railroad is constructed within this state, shall have the right to build extensions * * * of its line of railroad within this state of such length and in such direction as it may be authorized by resolution adopted by its board of directors."

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1908.

CHICAGO & ALTON RAILWAY COMPANY, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No. 238.
JOHN N. FAITHORN, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No. 239.
FRED A. WANN, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No. 240.

REPLY ARGUMENT FOR PETITIONERS.

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Of Counsel.

GUNTHORP-WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1908.

CHICAGO & ALTON RAILWAY COMPANY, Petitioner, *vs.* UNITED STATES OF AMERICA, Respondent.	No. 238.
JOHN N. FAITHORN, Petitioner, *vs.* UNITED STATES OF AMERICA, Respondent.	No. 239.
FRED A. WANN, Petitioner, *vs.* UNITED STATES OF AMERICA, Respondent.	No. 240.

REPLY ARGUMENT FOR PETITIONERS.

I.

From an examination of the Government's brief filed here the following appears:

(1) The Government does not take any exception to the statement of facts as made by the petitioners.

(2) The Government agrees that the rates named in the Alton's schedules were applicable to points on the Belt line, including among others, the plant of the

Schwarzchild & Sulzberger at Kansas City, Kansas. (Respondent's brief, p. 14, 18, 22.)

(3) In this connection it must be remembered that the Government proved as a fact (Rec., 34) (a) that the delivery of the freight in controversy was made to the Alton Company at Kansas City, Kansas, to be carried by the Alton Company over *its* rails, and (b) (Rec., 38) that the delivery was not made at the junction of the rails of the S. & S. Company with any other company, but, on the contrary, was made at the loading docks of the S. & S. Company.

(4) The Government also agrees that the petitioners were not indicted for violation of any provision of the Interstate Commerce Act except the giving of a rebate. (Government's brief, p. 8.)

In other words, the Government does not contend that the petitioners were indicted for failing to publish their terminal charges, rules and regulations. Neither does the government contend that the petitioners were indicted for any failure to adhere to a published rate.

Having conceded that the published tariff of the Alton Company obligated it to carry the freight of the S. & S. Company, at the expense of the Alton Company, from the point of delivery to its destination the Government then states that the question for decision is as follows (Government's brief, p. 19):

> "It is our contention that the rate named in the schedules of the Alton Railroad, published and filed as required by the Interstate Commerce Act, did not include the service rendered from the private tracks of the S. & S. Company, or at least the jury was warranted in so finding." * * *

This position is quite untenable. It is clearly the

law that if the published tariff does not state separately terminal charges and other similar items it necessarily includes them.

Cattle Raisers Ass'n of Texas v. *Fort Worth Co.*, 7 I. C. R., 513, 549.

Covington Stock Yards Co. v. *Keith*, 139 U. S., 128.

Interstate Commerce Commission v. *C., B. & Q. R. R. Co.*, 186 U. S., 320.

To illustrate: If the published tariff of the Alton Company required it to carry freight at its own expense from the point of delivery to its destination, and there had intervened between the rails of the Belt line and the Alton a mile and a half of railroad tracks over which it was necessary to carry the freight in order to get it to the rails of the Alton Company, the Alton Company would, under its published tariffs, have been compelled to pay trackage or wheelage for the use of such track. There is no difference between trackage intervening between the rails of the Belt line and the rails of the Alton Company and trackage intervening between the rails of the Belt line and the loading docks of the S. & S. Company. In either event the Alton Company was under obligation to pay the cost. More than that, it was the duty of the Alton Company to provide, at its expense, suitable terminals for receiving or delivering freight.

Covington Stock Yards Company v. *Keith*, *supra*.

The Alton Company had either the right to construct its own terminals or to pay for the terminals constructed by others.

Covington Stock Yards Co. v. *Keith*, *supra*.

In the case at bar, all that the Alton Company did was to pay a reasonable sum for the use of the yards and tracks necessary for the proper reception and carriage of the freight.

The foregoing case, and the cases cited in our original brief, including the English authorities, fully sustain this position.

II.

There is no dispute between the Government and the petitioners as to the proposition that the published tariffs contained no statement of a terminal charge. But—the Government says that because there was no statement of such a terminal charge and no rule or regulation which furnished a basis therefor, that therefore the payment of a terminal charge was a rebate.

The conclusion does not follow.

Suppose there had been *no published rate at all*, and the Alton Company had carried freight for the S. & S. Company, it would not have been guilty of rebating. It might have been guilty of some offense, but it would never have occurred to the Government to prosecute the petitioners on the charge of rebating. Likewise it follows that if there was a trackage charge or a wheelage charge which it was necessary for the Alton to pay in order to carry the freight, the fact that it was not published does not make the petitioner guilty of rebating. Suppose that the tracks of the S. & S. Company in the case at bar had in fact been owned by the Rock Island Company, and suppose (to carry the parallel further) that the Alton Company had agreed to carry the

freight from the S. & S. Company to its destination for its published rate, and had said nothing in its published rate about paying the Rock Island Co. trackage, but had in fact paid such trackage,—regardless of such violation of the act, if any, of which under such hypothetical circumstances the Alton might have been guilty, it is evident that it would *not* have been guilty of paying *a rebate*.

III.

It is said by the Government (Government's brief, p. 22)

> "that independent of questions relating to tariff schedules the service on account of which the refund was paid cannot be treated as embraced by the established rate from Kansas City for the reason that it is a service which the carrier could not be required to perform for the shipping public." * * *

The payment was not technically a "refund." It was a payment for the use of the tracks. Regardless, however, of the precise meaning of the word, the petitioners submit that the question of what the carrier company could have been *required* to do either for the S. & S. Company or for any other shipper has no bearing upon this case whatever. The record is entirely silent as to what the carrier company did or did not do with respect to other shippers.

The petitioners concede that, if the Alton Company had used the tracks of any other shipper at Kansas City, Kansas, and refused to pay for them under like circumstances, such shipper could have compelled the Alton Company to make it the same payments for the

same facilities. The record in this case, is however, silent as to such questions.

The abstract proposition, freed from all entanglements as to what the carrier company did or did not do with respect to others similarly situated is,—not could the Alton Company have been *required to* make the same arrangements with or payments to other shippers—but rather, could the Alton Company lawfully do what it did under *any* circumstances.

Petitioners insist that if it was lawful for the Alton Company under any circumstances to acquire the use of or the right to use tracks of the S. & S. Company and to pay a reasonable sum for such use, that the mere fact of its payment for such use and the non-publication of the same did not make of it a rebate.

All through the Government's brief under this particular portion of its argument the Government propounds questions which it does not answer. To illustrate: On page 23 the Government asks, referring to the tracks of the S. & S. Company:

> "Did these tracks become a part of the Alton's railroad? If so, for what time?"

It is quite evident why the Government did not answer this question. The stipulation of facts which the Government offered in evidence (Rec., 34) states that the S. & S. Company

> "did, at Kansas City, Kansas, *deliver* to and ship by the *Chicago & Alton Railway Company* * * * the cars * * * which were in fact transported by the said Chicago & Alton Railway Company to the places named * * * by rail over *its* lines and connections."

The delivery under the stipulation was made to the

Alton Railroad, to be carried over *its* rails. Can the Government seriously ask at what time the rails became the rails of the Alton Company when the stipulation shows that the delivery was made at the loading docks of the S. & S. Company to the Alton Company, to be carried over *its* rails? The answer to the question is—that at the time of the delivery, and for the purposes of that movement, the rails were in fact the rails of the Alton Company.

The Government then continues with the statement (p. 24):

> "It is of course unlawful for a carrier to add to the service rendered for the established rate a service which the carrier in connection with the transportation cannot be required to perform for the general shipping public."

Petitioners dissent from this statement. They insist that carriers can voluntarily do many things which they cannot be *required* to do, and that the chief limitation upon their voluntary action in such matters is that if they voluntarily perform a service for one they must do it for all others similarly situated. But, as has been stated, the petitioners are not charged with discrimination, and there is nothing in the record to allow any inference one way or the other, as to what was done with respect to others similarly situated.

Neither does it follow, as is stated by the Government, that transportation by railroad such as was done in this case necessarily included cartage (Government's brief, p. 26). This case has nothing to do with cartage or elevation charges, or anything of that kind. It involves merely the right of the carrier to pay for the use of railroad tracks and yards. That

is all. Regardless of what carrier companies may do with respect to cartage, or may not do, one thing is clear, as was stated by the court in *Covington Stock Yards Co.* v. *Keith, supra:*

> "The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars and ends only after the stock has been unloaded or delivered, or offered to be delivered to the consignee."

IV.

It is said in the Government's brief (pp. 30):

> The refund of the S. & S. Company cannot be justified as a lawful division of a published rate."

The petitioners do not attempt to justify this payment on the ground that it was a division of a published rate. This question is thoroughly discussed in our original brief on page 53 *et sequitur.*

V.

It is said in the Government's brief that it is not necessary to decide the question as to whether or not a carrier has the power to acquire the right to own and use tracks such as those in this case, because, as the Government said (Government's brief, p. 39):

> "In the case at bar the railroad company did not acquire this private track. It did not even acquire the right to use it as a part of its railroad route."

Petitioners do not comprehend this averment.

Again we recur to the stipulation. As has just been shown (Rec., 34), delivery was made at the loading docks of the S. & S. Company to the *Alton Company,*

to be carried from that point over the *Alton's* rails. The Government concedes that the Alton Company agreed to carry it from that point at its published rate to its destination. It is conceded that from that point it was impossible to move the freight to the destination except over the rails the fee of which belonged to the S. & S. Company, but the right to use which for the time being made them a part of the Alton Company's railroad route. For these rails the Alton Company paid to the S. & S. Company a trackage charge of $1.00 per car. There was no evidence to the contrary.

It was the duty of the carrier company to provide terminals and switches for the reception of such freight. It could either do this by providing its own or employing some one else to do it.

Covington Stock Yards Co. v. *Keith, supra.*

Transportation of the freight began the instant the carrier received it.

Covington Stock Yards Co. v. *Keith, supra.*

Under these facts for the Government to say that the S. & S. rails did not become a part of the Alton's railroad route or that the Alton Company did not acquire the right to use the tracks is equivalent to saying that the facts in the record are *not* the facts in the record.

In discussing this branch of the case the Government again argues by interrogation (Government's brief, pp. 42, 43). It asks questions which it does not answer. The petitioners submit that it makes no difference (Government's brief, p. 42), whether the carrier

company may or may not use tracks owned by the shipper against its will, which is one of the questions asked by the Government. That has nothing to do with this case.

Again, the Government says that a very simple test for determining whether or not the rails in question were a part of the Alton's interstate highway is (p. 44):

> "Suppose another shipper whose property was on the premises of the S. & S. Company had a carload of property for transportation over the Alton and called upon that carrier to transport it in accordance with its duty, on the ground that it had been tendered it to it as its tracks, under the evidence in this case could the Alton have been required to receive and transport it?"

The question has nothing to do with the case. What the Alton Company might have been compelled to do has nothing to do with the lawfulness of what it did do. One thing is clear; if, as the Government admits, it was necessary to move the freight to pass over the rails in question, if the Alton received the freight at the loading docks of the S. & S. Company, and, as was said in *Covington Stock Yards Co.* v. *Keith, supra,* if the transportation began the instant the freight was received,—then the rails while used for that purpose were a part of the route of the Alton Company, and there can be no other answer.

VI.

It is also unnecessary to discuss, in view of the Government's admission, that under its published tariffs the Alton Company was compelled to pay for the haul-

ing of the freight from the S. & S. Company to its destination, whether the word "Kansas City" includes every point in Kansas City or not. This argument is made on pages 44 to 47 of the Government's brief. Whether the word "Kansas City" or "Chicago" includes every point in Kansas City or Chicago beyond the rails of the company publishing a tariff is entirely immaterial in view of the concession of the government that in the particular case the published tariffs specifically designated the plant of the S. & S. Company as being a point for the reception of freight at the rate mentioned in "Kansas City." More especially is this so in view of the stipulated fact (Rec., 34) that the delivery was made to the *Alton* Company at the *loading docks* of the S. & S. Company at Kansas City, Kansas.

VII.

The Government insists that it is very questionable (Government's brief, p. 52)

> "whether prior to the passage of the Hepburn Act of June 29, 1906, a common carrier was authorized or permitted under the law to refund or repay to the shipper even reasonable charges or allowances for services which the shipper rendered in connection with such transportation or for instrumentalities which the shipper furnished for use therein."

In making this statement the Government ignores the rule of the Commission made prior to the passage of the present act. *In the Matter of Division of Joint Rates and other Allowances to Terminal Railroads*, 10

I. C. R., 385. It ignores the English cases cited in our original brief.

With reference to the ruling in *Welcetka Light & Water Company* v. *Ft. Smith & Western R. R. Co.*, 12 I. C. R., 503, the Government does not pretend to distinguish the case except to say that in that case the railroad company acquired the ownership of the track. There can be no legal difference between acquiring the ownership of a track and acquiring the use thereof. Either is lawful. Neither is rebating, unless there is paid, under the guise of one or the other an unreasonable sum for the ownership or right of user acquired.

VIII.

Finally, the Government says (p. 58):

> "In any event, it was clearly proper to submit to the jury the question whether the tracks were a part of the Alton's railroad or only a part of the plant equipment of S. & S."

The Government forgets that by the stipulation (Rec., 34) the Government proved that the S. & S. Company

> "did at Kansas City, Kansas, deliver to * * * the Chicago & Alton Railway Company * * * cars * * * which were to be and were in fact transported by the Chicago & Alton Railway Company * * * by rail over *its* line and connections."

The Government also forgets that it is expressly stipulated that the point of delivery was at the loading docks of the S. & S. Company, and not at the junc-

tion of the rails of the S. & S. Company with the rails of any other company.

The Government forgets that it is conceded that the Alton Company undertook to transport the freight from the point of delivery to the destination at the published rate, and that it was impossible to make the transportation without moving over the rails of the S. & S. Company from the point of delivery to their junction with the rails of the Belt Line.

The delivery having been made to the Alton Company, an interstate carrier for transportation in interstate commerce, and it being necessary for the Alton Company to move the freight a part of its journey over the rails of the S. & S. Company, there could not possibly be in the case any question of fact as to whether or not the rails were at that time and for that purpose a part of the railroad of the Alton Company. It is conceded that they must have been a part of an unbroken highway of commerce, in use by an interstate carrier from the point of delivery to the point of destination. There being no dispute as to the fact, indeed the fact being conceded, the sole and only question was a question of law which of course was a question for the court.

CONCLUSION.

In conclusion, petitioners submit that they did not argue, and do not now argue, whether they did or did not violate the requirements of the Act with respect to the publication of terminal charges, rules and regulations affecting the rate at Kansas City, Kansas. The Government has substantially staked its whole case on the alleged failure of the petitioning Company to make this publication. On the other hand, on the trial of the case, His Honor, Judge Landis, instructed the jury that the "*question of failure to publish was not before the jury for determination*" (Rec., 42).

On this point the Court of Appeals also said (App., 3):

> "Some discussion in briefs and in oral argument was had over the fact that the arrangement between the Alton and the S. & S. Co. was not published and filed with the Interstate Commerce Commission. * * * If divisions of rates or track rentals were required to be published, we think it is equally clear that a failure to publish could not make a rebate of what is not a rebate, and on the other hand that publication could not save what is a rebate from being found to be a rebate. So the aforesaid matter of publication has nothing to do with the case."

In fact the petitioners have not been indicted for any such violation of the law.

They insist that they paid a reasonable sum for property which they had a right to acquire; that it was a payment for a consideration upon a contract which they had a lawful right to make—a contract *which was lawful when made*, and still is lawful. This being so,

regardless of whether their failure to publish the fact of payment may have been a violation of the provisions of the Act with respect to publication, it could not in any event be construed as being a rebate. As we said in our original brief—

That which is not a rebate can never be made a rebate because it is not published.

Respectfully submitted,

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Nos. 238, 239, 240, &c.

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v.

THE UNITED STATES.

JOHN S. FAITHORN, PETITIONER,

v.

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FRED A. WANN, PETITIONER,

v.

THE UNITED STATES.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE CHICAGO AND ALTON RAILWAY COMPANY, petitioner, v. THE UNITED STATES. } No. 238.

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FRED A. WANN, PETITIONER, v. THE UNITED STATES. } No. 240.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

In view of what counsel for the petitioners have stated to be the questions involved and therefore necessarily decided in this case, it will be helpful to recur to the statute and to the record for the purpose of defining with precision the issue actually presented. We think that from this examination it will be apparent that at least some of the questions which counsel for the petitioners have discussed are of theoretical interest only and have no real relation to the facts in the case.

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THE PROVISIONS OF THE STATUTE INVOLVED.

The petitioners were prosecuted for violations of section 1 of the act of February 19, 1903 (the Elkins Act), 32 Stat., 847. That portion of the section in question which defines the offense is as follows:

> And it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced.

It is to be noted that the rebate, concession, or discrimination prohibited is one in respect of the transportation of property by a carrier subject to the interstate commerce acts. Section 1 of the act of February 4, 1887 (the original interstate commerce act), 24 Stat., 379, provides:

> That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment,

> from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, * * *.

The requirement as to the publication and filing of its tariffs by a carrier subject to the interstate commerce act referred to in the provision of the Elkins Act above quoted is found in section 6 of the act of February 4, 1887, as amended March 2, 1889. That section provides (25 Stat., 855):

> That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established, and *which are in force at the time upon its route*. The schedules printed as aforesaid by any such common carrier shall plainly state the *places upon its railroad* between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges.

Said section 6 also provides (p. 856):

> And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the

> provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.

In section 1 of the Elkins Act (32 Stat., 848) there is also the following provision:

> Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act.

Speaking of the interpretation to be placed upon the Elkins Act, the Supreme Court, in *Armour Packing Co.* v. *United States*, 209 U. S., 56, 71, says:

> The act seeks to reach all means and methods by which the unlawful preference of rebate, concession or discrimination is offered, granted, given or received. * * *
>
> This act is not only to be read in the light of the previous legislation, but the purpose which Congress evidently had in mind in the passage of the law is also to be considered.

The views of this court, speaking through Mr. Justice White, in *New York, New Haven and Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S., 361, 391, are apposite here:

"It can not be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. * * * The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer."

The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one

established, published and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published.

Again in the same case, page 80, the court said:

> * * * one rate (is) to be charged for similar carriage of freight, and that the filed and published rate, equally known by and available to every shipper.
>
> * * * There is no provision excepting special contracts from the operation of the law. One rate is to be charged and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. There is no provision for the filing of contracts with shippers and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.
>
> * * * the law is not limited to giving equal rates by indirect and uncertain methods. It has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.

To recapitulate:

The statute requires a carrier subject to the provisions of the act to publish and file schedules showing the rates in force upon its route as a common carrier. These schedules are required to show the *places upon its railroad* between which the transportation is carried on. They are required to state all terminal charges and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of the rate. It is made unlawful for the carrier to charge a greater or less compensation for the transportation with respect to which the rate is established *or for any service in connection therewith* than is specified in the published schedule of rates. The carrier is required to file with the Interstate Commerce Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to the traffic affected by the act. Whenever a carrier has filed or published a rate, that rate is conclusively presumed to be the legal rate and to contain all rules, regulations, and arrangements which directly or indirectly affect the amount to be paid for the transportation described in the schedules. By no special or secret arrangement may anything, directly or indirectly, be added to the service described in the schedule to be rendered for the stated rate. Nor may any portion of the charge fixed in the schedule for the service described therein to be rendered be remitted or returned directly or indirectly to the shipper. If a rate is published for a given service without a statement of rules or arrangements

either for additional service or for an indirect return to the shipper of a portion of the rate, it must be conclusively presumed as against the carrier that there are no such rules or arrangements, and that the service to be rendered by the carrier is as stated in the schedule and that the amount to be collected and retained for the service is the amount specified in the schedule. And to offer, give, or grant a rebate or concession by which directly or indirectly the rate at which the property is actually transported becomes less than the rate named in the published and filed schedule, is made an offense punishable by a fine of from $1,000 to $20,000.

THE INDICTMENT.

The petitioners were adjudged guilty under each of eight counts of the indictment. These counts covered two separate transactions, the charge as to each transaction being differently set forth in four separate counts. The first and fifth counts charged an *offer* to pay rebates and concessions. The second and sixth counts charged the *granting* of rebates and concessions. The third and seventh counts charged the *giving* of rebates and concessions. The fourth and eighth counts also charged the *giving* of rebates and concessions, but the phraseology of the indictment was in some respects different from that of the third and seventh counts.

The gist of the charge as to each transaction was the offering or giving of a rebate by which the petitioner, the Chicago and Alton Railway Company, acting through its responsible officers and agents, John N.

Faithorn and Fred A. Wann, transported certain carloads of dressed meats and packing-house products for the Schwarzschild & Sulzberger Company from Kansas City, Kans., to destinations in other States at a rate of $1 per carload less than that named in the tariffs published and filed in accordance with the requirements of the interstate-commerce act. No question is presented growing out of the form of the indictment or as to its sufficiency. The penalty was imposed as for two distinct offenses, one penalty covering all of the four counts relating to each separate transaction.

THE ERRORS OPEN FOR REVIEW.

The facts were stipulated. No exceptions were taken to the charge to the jury. The rulings upon the evidence tendered by the petitioners and excluded present no question in addition to the one fundamentally involved in the case. That question is whether or not upon the admitted facts the petitioners were properly convicted of granting a rebate whereby property was transported at a *less rate than that named in the tariffs published and filed* by the carrier as is required by the interstate commerce act and its amendments or whether the case by preemptory instruction should have been withdrawn from the consideration of the jury.

THE FACTS MATERIAL TO THE ISSUE TO BE DECIDED.

In the majority opinion of the Circuit Court of Appeals the facts pertinent to the question to be decided are summarized as follows (Rec., p. 86):

The Government proved that the Chicago and Alton was an interstate common carrier, having a line extending eastward from Kansas City, Mo.; that the Kansas City Railway Company was an interstate common carrier between Kansas City, Kans., and Kansas City, Mo., having a belt line over which it hauled cars of freight from industries along its tracks to various railroads; that the Schwarzschild & Sulzberger Company, a corporation, owned and operated a meat-packing plant at Kansas City, Kans., adjoining the tracks of the Belt Line; that the S. & S. Co. was not a common carrier; that within its plant, and running around and between various buildings thereof, the S. & S. Co., at a cost of $75,000, built about a mile and a half of tracks, switches and sidings, on which the annual outlay for maintenance and taxes was $1,200; that the S. & S. tracks connected with the Belt Line tracks at the property line; that the Alton had arrangements with the Belt Line and with eastern railroads whereby the Alton undertook to transport property in interstate commerce from Kansas City, Kans., to seaboard cities; that the Alton published and filed schedules of rates for such transportation; that the Belt Line published and filed a rate of $3 a car for hauling cars of freight over its line from the S. & S. plant to the Alton; that the Alton transported various carloads of freight for the S. & S. Co. from Kansas City, Kans., to eastern points, collected from the S. & S. Co. the full amount of the published rates, and paid to the Belt Line $3 a car, which amount was in-

cluded in the Alton's published rates, and that the Alton, through plaintiffs in error, Faithorn, as vice-president, and Wann, as general freight agent, paid back to the S. & S. Co., under book entries of "refund of terminal charges," $1 on each car for the use made of the S. & S. tracks in getting the S. & S. Co.'s cars of freight out upon the Belt Line's tracks.

Certain of the facts stated in the stipulation may be eliminated from consideration very properly because they have no real bearing upon the issue. Thus it is wholly immaterial what the tariffs of the Belt Line were prior to January, 1901, or what was the course of dealing between the Belt Line and the Schwarzschild and Sulzberger Company with reference to the use of these private tracks, or what the facts were with reference to the change in the schedules of the Belt Line on January 1, 1901. The question to be decided relates to what could be done lawfully after the passage of the act of February 19, 1903, under the schedules published and in force at the time of the transactions in question.

It will aid in the consideration of this case to analyze the evidence more in detail with a view to grouping the facts in their relation to the elements of the offense defined by the statute. The rebate prohibited is one in respect of the transportation of property in interstate or foreign commerce by a carrier subject to the act, whereby such property shall be transported at a less rate than that named in the tariffs published and filed as required by the act.

The Schedules.

The tariffs required to be so published and filed are tariffs showing the rates which the carrier has established and which are in force upon its route, and those schedules are required by law to state the places upon its railroad between which property will be carried and also the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such rates. In other words, there must be a definite and complete description of the service to be rendered by the carrier to the public and a statement of the fixed and uniform rate for such service "*equally known by and available to every shipper.*"

What is the service with respect to the transportation involved in this case described in the published and filed schedules?

It is stated in the stipulation of facts in the case (Rec., p. 35):

> The Chicago and Alton Railway Company had published and filed with the Interstate Commerce Commission, as alleged in the indictment and as is required by law, its tariffs of rates and joint tariffs of rates from Kansas City to the various points mentioned in the said tables, and which tariffs of rates were on file and in full force and effect during all of said time covered by the indictment.

The averment in the indictment (Rec., p. 17) admitted in the stipulation is as follows:

> For the transportation thereof, as aforesaid, the said Schwarzschild and Sulzberger Company did thereupon pay to the said common carrier, and the said common carrier did receive from the said Schwarzschild and Sulzberger Company, in items and totals to the said grand jurors unknown, the freight rates and charges set forth in the joint tariffs and schedules showing the legal rates and charges established by the said common carrier and the said connecting railroads and in force at the time upon their routes, copies of which said tariffs and schedules, as well as of the said contracts, agreements, and arrangements with the said connecting railroads, too voluminous to be here set forth, had before then been by the said common carrier filed, and were then on file, with the Interstate Commerce Commission of the said United States, as required by law.

Among the connecting carriers named in the indictment (Rec., p. 15) as parties to these joint tariffs was the Belt Railway Company. The published and filed tariffs of the Belt Line named switching charges from places on its railroad to its connection with the Alton. In the stipulation of facts it is stated (Rec., p. 35):

> That the said Belt Line had fixed, published, and filed its tariffs of rates with the Interstate Commerce Commission as is required by law of all carriers engaged in the transportation of property in interstate commerce, and that the rate so fixed and published for the said Schwarzschild & Sulz-

> berger Company at Kansas City, Kans., was $3 per car for every carload transported by the Belt Line to the connection of the said The Chicago and Alton Railway Company with said Belt Line.

By arrangement the rates named in the Alton's schedules were made applicable to points on the Belt Line, the Alton collecting its full published rate and paying to the Belt Line the charge of the latter of $3 per car in accordance with its published and filed tariffs; and, according to the stipulation of facts, all these schedules and agreements, as charged in the indictment, were duly published and filed. The effect, therefore, of the schedules was to name from the place specified on the railroad of the Belt Line, viz, Schwarzschild and Sulzberger Company, at Kansas City, Kans., the same rate as was named from places on the railroad route of the Alton, and to allow to the Belt Line the rate of $3 per car for the switching from its connection at the plant of the Schwarzschild and Sulzberger Company to its connection with the Alton.

The service described to be rendered therefore in the lawfully published and filed schedules was transportation from Kansas City on the Alton's railroad, including places on the railroad of the Belt Line to which the Kansas City rate was made applicable. As stated, it must be conclusively presumed to be a service available to every shipper—a service which, in the discharge of its duties as a common carrier,

the Alton could be compelled to render on equal terms to all. In the very nature of things, it can not be construed to involve by implication a service which the Alton could not have been compelled to perform as a common carrier in connection with the transportation of property between the places on its railroad and those on the connecting carriers as named in the schedules. It can not be construed to include transportation over that which, within the meaning of the interstate-commerce act, is not a part of its railroad or of the railroad of the connecting carrier and used in connection with the operation of the road as a common carrier. It can not be construed to include, in addition to transportation over the railroad route, and those things incident thereto, any terminal charges, privileges, facilities, or extra services not stated in the published and filed schedules. It can not be broken up so as to include in the division any terminal charges or allowances not separately stated in the schedules. It can not be construed to include the transfer through any instrumentality whatsoever of the property transported, to or from its railroad or the places established for the general use of the public in the reception and delivery of freight. Much less can it be construed to include a service which, in view of the prohibition of the interstate-commerce act against preferences and discriminations, the carrier may not lawfully render or contract to render for the established rate.

The service for which the refund of $1 per car was paid to the shipper.

In their dealings with each other the parties themselves classified and characterized the service on account of which the refund to the shipper was made. It is stated to be "a *refund of terminal charges assessed at Kansas City.*" (Rec., p. 41.) This is the language of the statement in connection with which the money was returned to the Schwarzschild and Sulzberger Company. That is to say, in the very language of the statute, it is described as an allowance made with respect to and in connection with the rate charged for the transportation of the property. As pointed out, the statute requires all terminal charges and all rules and regulations of this character to be stated separately in the published and filed schedules. In the absence of such a statement in its schedules there is no lawful basis for breaking up the rate named so as to furnish a basis for the allowance of such charges and as against the carrier it must be taken conclusively that the rate has not been so divided. To rule otherwise is to permit carriers to break up their published rates and make such allowances by secret arrangements, thereby destroying the great object of the statute—the publicity and uniformity of railroad rates. The cars in question were transported for the published and filed rates from the point at which they were received on the railroad of the Belt Line to their respective destinations. In addition to this, they were hauled from the places in the plant of the Schwarzschild and Sulzberger Com-

pany where they were loaded over the tracks owned and controlled by the Schwarzschild and Sulzberger Company and on its premises, down to the point at which they were switched to the tracks of the Belt Line. It was a stipulated fact that these tracks at the plant of the Schwarzschild and Sulzberger Company were "not used for any purpose except the handling of the business moving in and out of the said Schwarzschild and Sulzberger Company's plant, and for switching purposes within the plant." (Rec., p. 39.) It was further a stipulated fact that the cars loaded on the private tracks of the Schwarzschild and Sulzberger Company and hauled over them were transported by many other railroads in addition to the Chicago and Alton and that the "said tracks of the Schwarzschild and Sulzberger Company are also used for all switching purposes made necessary in the handling of the business of the plant." It was also stipulated (Rec., p. 38) "that the said Schwarzschild and Sulzberger Company is a corporation organized to do a packing business and is not a railroad corporation, and that no tariff of rates or agreement in respect thereto had been fixed or made or filed with the Interstate Commerce Commission of the United States prior to or at the time of any of the shipments mentioned in the indictment pertaining to the said railroad track and switches of the said Schwarzschild and Sulzberger Company. That the schedules required by law to be established and printed and kept open for public inspection by the carrier, and which

were in fact so established, printed, and kept open showing the charges for transportation of the product shipped by the said Schwarzschild and Sulzberger Company to the points of destination of such shipment, as mentioned in the indictment, did not state separately or otherwise any terminal charges whatever for or on account of said switches and railroad track of the said Schwarzschild and Sulzberger Company."

Here, then, were tracks owned and controlled by the Schwarzschild and Sulzberger Company, used by it in connection with the operation of its plant, used in moving cars from one part of the plant to another in the conduct of its private business, used also in switching cars which were ultimately transported over many other railroads in addition to the Alton—as much an integral part of the plant as the buildings and roads, the elevators and docks, and the horses and wagons which were used in hauling its property. The Alton established and published and filed a rate from places on its railroad and on the railroad of the Belt Line. Can it be said that the places on these private tracks on which the cars were loaded were places on the railroad route of the Alton or Belt Line within the meaning of the interstate commerce act merely because they were within the territorial limits of the city of Kansas City? Is the situation changed because the property is conveyed to the railroad of the carrier over rails laid down on ties instead of in a wagon or an elevator? Suppose that the tracks of a carrier are at the door

of a plant in Kansas City. Can it be said that a rate from Kansas City properly includes the transfer of the property transported from the tenth floor of the building? Does the published rate include cartage from one part of the plant of a shipper to another, where it is turned over to the carrier? Does it include hauling to the railroad of a carrier for a shipper who owns and controls a private railroad track on his premises leading to the railroad and not include the same service for the shipper who must use a trolley car or a horse and wagon for transferring his property?

THE QUESTION FOR DECISION.

It is our contention that the rate named in the schedules of the Alton Railroad published and filed as required by the interstate-commerce act did not include the service rendered over the private tracks of the Schwarzschild and Sulzberger Company (or at least that the jury was warranted in so finding); that there was no lawful basis for the allowance of any terminal charges in that connection, and that therefore by the payment of the refund of $1 per car the property was transported at a less rate than that named in the schedule for the service therein described.

1. The published and filed schedules contained no statement of a terminal charge and no rule or regulation which furnished a basis for the refund of this portion of the established rate.

The Elkins Act requires absolute adherence to the published and filed schedules. These schedules are required to name the rates in accordance with the

provisions of the interstate commerce act. The rate as published and filed is conclusively presumed to be the legal rate. The schedules are required to state plainly the precise transportation to which the rate applies, to state all terminal charges, and any rules or regulations in anywise affecting the amount of the rate. The central and controlling purpose of the law was to require "but one rate to be charged for similar carriage of freight, and that the filed and published rate, equally known by and available to every shipper." The prohibition against directly or indirectly charging less than the published rates was made applicable to every method of dealing by which the forbidden result could be brought about. The law contains no provisions for the filing of contracts with shippers, the effect of which will be directly or indirectly to alter the established rate. (32 Stat., 847; 24 Stat., sec. 6, 381; *Armour Packing Co.* v. *United States*, 209 U. S., 56; *N. Y., N. H. & H. R. R. Co.* v. *I. C. C.*, 200 U. S., 361, 391.) In the dealings between the shipper and carrier the amount refunded was treated as a terminal charge. It is so described in the statements accompanying the payment. The rate named in the schedules was so much per carload. The refund was so much for each car transported, and, without regard to the name given by the parties to the transaction, the return of this money had a direct connection with the rate finally paid by the shipper for the transportation. The arrangement under which the refund was given was made through the department which established the

published rate. The amount refunded was in no sense treated as an operating expense of the road. Until the trial there was no attempt to treat it as rental paid for the use of the tracks of the Schwarzschild and Sulzberger Company. Its plain effect was to reduce by $1 per car the rate paid for the transportation, so that without regard to the question of the ownership or use of the private tracks of the Schwarzschild and Sulzberger Company in connection with the transportation, it was plainly a regulation which affected the aggregate of the rate ultimately paid by Schwarzschild and Sulzberger Company for the transportation. Such a terminal charge or regulation must be stated in the published schedules, and in the absence of such a statement there is no basis for its allowance, and the carrier in making the refund is guilty of granting an unlawful rebate from the rate named in its published and filed schedules. It seems to us that this is true without regard to the question of unlawful discrimination or the inherent invalidity of the arrangement.

Take the view of counsel for the petitioners. A rate is named from Kansas City. This, counsel for petitioners contend, applies not only to points on the Alton and Belt Line, as stated in the schedules, but to the point on the tracks of the Schwarzschild and Sulzberger Company where the car is loaded. As to points on the Belt Line the rate is divided into the switching charge of $3 per car established for the haul over the Belt Line. Suppose that for the transportation of a car the Schwarzschild and Sulzberger

Company had paid the full rate stated in the schedule and in addition had paid the switching charge of $3 to the Belt Line. Under these circumstances the shipper plainly is entitled to a refund of $3 per car, because it is a charge specified in the published tariffs. But may a carrier pay an additional $1 on account of a terminal charge not so fixed and established? We submit that, independent of all other considerations, this arrangement was a direct violation of the provision of the statute requiring adherence to established schedules.

2. Independent of questions relating to the statements in the tariff schedules, the service on account of which the refund was paid can not be treated as embraced by the established rate from Kansas City, for the reason that it is a service which the carrier could not be required to perform for the shipping public in connection with the transportation of the property over that route, and which therefore it could not lawfully render to a favored shipper in connection with such transportation.

The Alton had published and filed schedules naming rates from Kansas City, Kans., to eastern points. It had made its rates applicable to points on the Belt Line, including the one at which the cars were received from the tracks of the Schwarzschild and Sulzberger Company. The rate established was for transportation from a point on its railroad route—that is, for transportation from a point on the highway used by it as a common carrier in serving the shipping public generally. It was not a rate for transportation from any point within the territorial limits of the city of Kansas City. It was a rate for transportation from points on its railroad and on that of the Belt Line in Kansas City.

It is, of course, elementary that a carrier can not be compelled to receive goods, still less to send and get goods at a point off its line. Its duties in this regard are confined and limited to its depots or regular shipping or receiving points. While a shipper having access to a railroad by spur track or otherwise should have a right to demand that the carrier receive his bulky goods *at the track*, still he has no right to require the carrier to receive the goods on or along a private track. (1 Hutchinson on Carriers, 3d ed., 122; Beale and Wyman Railroad Rate Regulation, secs. 219, 221, 222.) Here were tracks on the premises of the shipper, owned and controlled by the shipper, used in transferring property from one part of its plant to another, used in switching cars which were to be transported over many railroads. Was there in the arrangement for the payment of the refund of $1 per car a single element which made those tracks a part of the Alton's railroad route? Did this track become a part of the Alton's railroad? If so, for what time? The arrangement was to refund $1 for each car transported. Was there a moment when the Schwarzschild and Sulzberger Company could have compelled the Alton to transport a car from the place on the private tracks where it stood loaded? Could the Schwarzschild and Sulzberger Company at any time, with respect to this private track, have required the Alton to do for it what the Alton was required to do for the shipping public at the track which was a part of its railroad route? If Kansas

City means the place at which the cars were loaded on these private tracks, then why does it not mean any factory or wholesale house in Kansas City, and why may not the carrier be required to cart the property to be transported from such a place of business of the shipper to its tracks?

It is of course unlawful for a carrier to add to the service rendered for the established rate a service which the carrier in connection with the transportation can not be required to perform for the general shipping public. To do this is to charge the favored shipper for the service covered by the established rate a less compensation than is exacted from other shippers under substantially similar circumstances and conditions, in violation of the provisions of sections 2 and 3 of the interstate-commerce act (24 Stat., 379, 380). This was the rule laid down in *Wight* v. *United States*, 167 U. S., 512. There an allowance of 3½ cents per hundred pounds had been made by a carrier of which the convicted defendant was the responsible agent, to a shipper for cartage to his place of business, while another shipper was required to pay the full rate. The justification of the carrier was that the favored shipper had a siding which connected with a competing railroad so that that railroad could deliver the property transported at the place of business of the shipper, while it was necessary for it to cart it from the depot of the railroad which granted the allowance. It was claimed that it was necessary to make this allowance for cartage in order to get the

business of the shipper. The Supreme Court said (p. 517):

> The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than another. * * * The one shipper paid 15 cents a hundred; the other, in fact, but 11½ cents. * * * Indeed, the section itself forbids the carrier "directly or indirectly by any special rate, rebate, drawback, or other device" to charge, demand, collect, or receive from any person or persons a greater or less compensation, etc. And section 6 of the act, as amended in 1889, throws light upon the intent of the statute, for it requires the common carrier in publishing schedules to "state separately the terminal charges, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges." It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.

What was said there with reference to the section prohibiting unjust discriminations applies with added force to the section prohibiting rebates and concessions from the published and filed rate. If the service

rendered is not covered by the established rate and is not one which the carrier is required to perform for the shipping public in connection with the transportation of property, it is a device whereby the property is transported at less than the established rate. And so, if an allowance is made to a shipper for service performed by the shipper, on the theory that it should have been rendered under the published rate by the carrier, when in fact it is not covered by that rate, that allowance constitutes a rebate from the established rate.

It follows therefore that the service over these private tracks was no part of that described in the published and filed schedules. The service there described was transportation from points in Kansas City on the railroad of the Alton and its connection, the Belt Line, over the route of either. It can not be said under the evidence in this case that this private line, used by the Schwarzschild and Sulzberger Company as a part of its plant equipment, was in any sense a part of the railroad route of the Alton. It had no connection with the tracks of the Alton. The Alton had no control over it. The Alton could not have sent an engine or hauled a car over it against the will of the owner. To say that transportation from Kansas City over the route of the Alton includes transportation over these private tracks so that the carrier may pay for their use as a part of the service which it was bound to render under the established rate, is to say that such transportation includes cartage from any point in Kansas City not on the tracks

of the Alton or on any railroad track and transportation from places on railroads in Kansas City to which the Alton's published rate had not been extended or which had not been made a part of the route of the Alton.

The application of these principles to the facts of the case at bar is summed up in the majority opinion of the Circuit Court of Appeals as follows (Rec., p. 89):

> The trouble in this case, however, comes from the fact that the Alton did not take a lease of the S. & S. tracks for the purpose of discharging its undertakings as an interstate common carrier. It had undertaken to carry for all the shipping public a carload of meats from Kansas City, Kans., to New York for $20, say. For that purpose it controlled, by means of its connections, a public highway. The S. & S. tracks were not a part of that highway. They were not used by the Alton in serving the shipping public generally. Their only use was in getting a particular shipper's freight from his own property out to the public highway. Suppose that the S. & S. Co., instead of ties and rails, had put down a paved roadway on its land, and that the Alton, in addition to the $20 worth of transportation it was giving to other shippers, furnished horses and wagons to haul the meats from the packing rooms to the Belt Line, would it be contended that the Alton could lawfully still further pay the S. & S. Co. for the use of the pavement? Or suppose that the S. & S. plant was all under one roof and that the trolleys which convey carcasses and cuts of

meat from one department to another were so arranged that the finished product arrived at the property line adjoining the Belt tracks, could the Alton properly make an allowance for the use of the trolleys as instrumentalities furnished by the shipper in the transportation of property in interstate commerce? In our judgment, the jury were warranted in finding that the tracks in question were plant facilities, as clearly as the supposititious pavement and trolleys would be plant facilities, and not instrumentalities for the Alton's use in discharging it duties to the public. * * * This case is ruled in principle, we believe, by the decision in *Wight* v. *United States*, 167 U. S., 512, that an arrangement whereby a particular shipper was allowed to offset against his freight bills the true value of the use of his teams in hauling the property from the railroad to his warehouse was a discrimination against other shippers of the same class of property in the same city who were compelled to pay the freight in full. It is contended that the citation is inapplicable, because the question there was of discrimination and here of rebate. Under the Cullom Act the standard of comparison was the treatment of other shippers; it was necessary to prove not only that the favored shipper really paid less than the published rate but also that other shippers paid the full rate or a greater rate than that of the favored shipper. Under the Elkins Act the standard of comparison is the published rate; it is only necessary to prove that the favored shipper has had his property trans-

ported at a less rate than that published and filed. Both acts were aimed to kill favoritism, and the favoritism in the Wight case was of the same kind and effect as in this.

We would also call to the attention of the court the statement of the learned trial judge made in connection with the denial of the motion to take the case from the jury, as follows (Rec., p. 45):

> The question here is whether or not the payment so made is a device whereby the packing company's property is transported at less than the Alton's published rate, which, as seen above, includes the service on the Belt tracks. It would seem that to state that question is to answer it. By the word "Rate" is not meant merely the figure printed on the schedule filed with the Interstate Commerce Commission. The real rate is the net cost to the shipper of the transportation of his property, the net amount the carrier receives from the shipper and retains. This net amount in the pending case is $1 per car less than the carrier's published schedule representing the rate to be paid.
>
> Viewing the transaction from the standpoint most favorable to the defendant, it amounts to the railway company assuming the cost of getting the shipper's property to the carrier's rails for transportation, a substantial consideration not mentioned in or contemplated by the published schedules. With equal propriety, its schedules being silent on the subject, a carrier might pay the consignor's or consignee's bills for the cartage of property between their warehouse and the railway depot.

> The object of the statute relating to interstate commerce is to secure the transportation of persons and property by carriers for a reasonable compensation. They recognize the obvious fact that no rate can be reasonable that is higher than somebody else has to pay. Therefore, they require the carrier to establish and adhere to an absolute standard of uniformity. The requirement of publication is imposed in order that a person having freight to ship may ascertain exactly, by inspection of the schedule, what will be the cost to him of such transportation, and not only so, but under the law he has a right likewise to know by an inspection of the same schedule exactly what it will cost his competitor for such transportation.

3. The refund to Schwarzschild and Sulzberger Company can not be justified as a lawful division of the published rate.

The Schwarzschild and Sulzberger Company was not a common carrier. Section 6 of the statute provides for the filing of agreements for joint rates between common carriers only. The provision is as follows (25 Stat., 856):

> And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said Commission.

As ruled by the Interstate Commerce Commission (*Central Yellow Pine Assn.* v. *V. S. & P. R. R. Co. et al.*, 10 I. C. C. Rep., 193, and *Central Yellow Pine Assn.* v. *I. C. R. R. Co. et al.*, 10 I. C. C. Rep., 505) a common carrier subject to the acts to regulate commerce can allow a division of rate only to another carrier which participated in the particular traffic to which the rate is applied, and is also subject to the provisions of those acts. There is no pretense in this case of any filing of any such agreement for a joint rate.

The refund therefore can not be justified as a lawful division of a rate. As shown above, it can not be justified as compensation for a part of the service which the carrier was not required to render under the established rate. It follows therefore that it must be held to have a direct relation to the published and filed rate and to amount to an unlawful rebate from the established rate.

THE OPINIONS OF THE CIRCUIT COURT OF APPEALS.

All three of the judges of the Circuit Court of Appeals unite in the judgment of affirmance. Judge Grosscup rests his conclusion on substantially the first ground above stated, viz, that, regardless of whether a valid lease of this private track might have been made so as to constitute it a part of the Alton's railroad route in Kansas City, payment for the use of the tracks could not be made in the form of a refund from the rates stated in the established schedules. In other words, he would hold the parties to the construction which they had placed upon their own deal-

ings. They had treated the payment of $1 per car as the return of a part of the established rate, and under the statute that could not be done without a statement in the published and filed schedules. His language is (Rec., p. 91): "An arrangement of that kind between the two companies can not, in my judgment, for reasons of public policy that the interstate commerce act was intended to carry out, be lawfully based on division of rates, or in any other way be connected with, or affect, the rate-making function of the railroad company; for to secure equality among shippers, the law commands not only that the rates shall be equal but that they shall be fixed and certain—subject to no addition or diminution against, or in favor of, any one—so fixed and certain that any shipper can with his head and pencil figure out from the tariff sheets just what the rate is, both for himself and for his competitors; from which it follows that, while the railroad company, through its appropriate department, might lawfully perhaps have leased these rails of the S. & S. Company, paying therefor a reasonable rental, it could not lawfully, for the reasons of public policy named, through its tariff department and on the basis of a division of rates (the whole arrangement secret so far as the published tariff sheets were concerned) have made the arrangement that was offered as a defense to the offense prosecuted."

It is true that in his opinion he states that the interstate transportation of the property began when the cars commenced to move from the places where they were loaded. It does not seem to us, however, that

this is the precise question involved in this case. The question is, not when the interstate commerce, within the broad meaning of that term, commenced, but when the cars began to move from a place on the railroad route of a carrier subject to the interstate commerce act; when they began their journey upon the highways of interstate commerce specified in the established schedules of the carrier; when the Alton had commenced to render the service covered by its published rate. The distinction is illustrated by *Kelley* v. *Rhoads*, 188 U. S., 1. There it was held that within the broad definition of that term a herd of sheep driven for a distance of 500 miles across the country for the purpose of shipment by rail was property engaged in transit in interstate commerce. Of course the service of the carrier began only when the sheep reached its tracks. So in the case at bar the property might have been transported to the tracks of the Alton by another carrier under a through bill of lading, so that it started upon its journey in interstate commerce before it reached the tracks of the Alton. The service of the Alton commenced not when the property began to move in interstate commerce but when it began to move from a point on the Alton's railroad route. The term "Kansas City" can not be said to apply to all points within the territorial limits of that city where property may start to move in interstate commerce. Property may be delivered to a transfer company which undertakes to send it through to destination. As stated above, the ques-

tion for decision is when did the Alton commence to render the service as a carrier over its railroad tracks which it had undertaken to render for the public under its published and filed schedules.

Again, Judge Grosscup, in his concurring opinion, says (Rec., p. 91):

> Now, I am inclined strongly to the judgment that through contract with the parties interested the railroad company could, at its own expense, lawfully have laid its own rails up to and alongside of the S. & S. Company's warehouses, notwithstanding the fact that title to the land under the rails should remain in the S. & S. Company; or could have leased the rails laid by the S. & S. Company of that company; provided, always, that the transaction was not a subterfuge to cover up discriminations.

We suggest, however, that here again is a question which it can not properly be said is actually involved in this case. The Alton did not lay its rails to the warehouse of the Schwarzschild and Sulzberger Company. It did not lease the rails of that company. It had absolutely no right to use the rails of that company for hauling a single car without permission from the owner of the tracks. It could not, against the objection of the owner, have delivered a single car on those tracks.

In the majority opinion of the court Judges Baker and Seaman were unwilling to rest the judgment of affirmance upon the ground that the parties should be held to the form with which they had clothed the

transaction. In their opinion the payment is treated as if it had been made without any direct relation to the established and published rate. It was treated, for instance, as if the shipper had carted the property to the station and the carrier, in making an allowance of so much per hundred on account of the cartage, had paid for the use of the wagons at the rate of so much per day or per month.

This gives to the petitioners a benefit to which it seems to us they are not entitled in view of the rigid provisions of the law requiring publicity and uniformity of rates. The statute requires a definite statement of the established rate, as well as of any regulation in connection with it which determines the amount to be paid by the shipper ultimately. As stated in the Armour Packing Company case, the central and controlling purpose of the law was to require all shippers to be treated alike and "but one rate to be charged for similar carriage of freight, and that the filed and published rate, equally known by and available to every shipper." This allowance was in connection with the transportation of property. It had a direct relation to the established rate. There was no rental of tracks without regard to the business to be furnished by the shipper. The allowance was from the established rate and was intended as an inducement to the shipper to send his property over the line of the carrier making it. The Alton never pretended that it had any lease of these tracks. It undertook to refund the money as a terminal charge—*a part of the established rate*.

In the opinion of the majority of the court the judgment of affirmance is based on the ground that the arrangement for this allowance was illegal and void, and that therefore the service was not one which could be legitimately added to that covered by the established schedules of the carrier. The majority of the court held that these tracks could not be said to be a part of the Alton's railroad route in interstate commerce, and that the service rendered over them was analogous to the carting of the property from the place of business of the shipper to the tracks of the carrier. In the majority opinion the court in the consideration of the question used the following language (Rec., p. 89):

> Wherever the Alton needed tracks for that purpose (for use in discharging its duties to the public as a common carrier) it could acquire the land by exercising the sovereign power of eminent domain which had been conferred upon it by the people. But manifestly the Alton could not condemn the S. & S. tracks for the sole purpose of hauling the S. & S. Co.'s product from its warehouse to the Alton's public highway, because that would be a private purpose. Whatever property the Alton could condemn it could acquire by deed or lease, but by taking a lease it could not change a private purpose or use into a public one.

While it seems to us that, weighing the words of this statement carefully, it is entirely accurate, it does not seem that its correctness is a question really pre-

sented for decision. The Alton had not condemned the tracks of the Schwarzschild and Sulzberger Company. It had not undertaken to condemn them. It had not acquired the tracks by purchase or by lease. It had acquired absolutely no rights in them whatever. They were in no sense part of its railroad route any more than they were a part of the railroad route of every carrier to which the cars of the Schwarzschild and Sulzberger Company were ultimately turned over for transportation. The admitted fact was that they were a part of the plant of the Schwarzschild and Sulzberger Company and were used by that company in the conduct of its business for transferring property from one part of the plant to another. And so what the Alton might have done in the way of condemning these private tracks would seem to be a question which, while involving interesting points of law, may be treated properly as having no real connection with the facts presented by the record. We shall, however, notice it again when we come to a consideration of some of the questions which counsel for the petitioner assert are involved in this case.

QUESTIONS ERRONEOUSLY ASSUMED BY COUNSEL FOR PETITIONERS TO BE INVOLVED IN THE DECISION OF THE CASE.

The learned counsel for the petitioners in their presentation of this case have discussed questions which, we submit, are far broader in their scope than those actually presented by the facts, and have assumed that those questions are involved in the decision of the case. We would therefore direct the attention of the court to the questions as stated

by them, for the purpose of defining and limiting just what is here for decision.

First. It is asserted by counsel for petitioners that the court has erroneously decided "that a common carrier could not, for a reasonable compensation, acquire the right to use and operate an industrial track, because, in the language of the court, 'it is for a private purpose.'" The same assertion was made in the petition for rehearing filed by the petitioners in the Circuit Court of Appeals. That court in denying the petition for a rehearing stated in positive terms that such an interpretation could not properly be placed upon the opinion of the court and that the question actually decided was very much narrower in its scope than the one stated by the counsel for petitioner.

Of course, it is apparent that much of the indefiniteness of the question as stated by counsel for petitioners grows out of the use of the term "industrial track." Within the meaning of the interstate commerce act everything with rails laid down on ties is not a railroad. It is the track used by a common carrier as a part of its highway in interstate commerce, recognized and held out to the shipping public as an integral part of its railroad route.

It is therefore not necessary to decide whether or not a railroad may build a switch or a side track to a factory or plant or whether it may purchase or lease one which has been built already, any more than it is necessary to decide whether a railroad company may acquire horses and wagons to haul goods to and from

its stations or operate a cable line. It is not necessary to decide whether or not if a railroad company builds a switch to the plant of one shipper for the private use of that shipper and refuses to build similar switches to the plants of other shippers under the same circumstances and exacts no more for the service rendered to the favored shipper than the rate charged the general public for delivery at its rails where the public transacts business, the railroad company is guilty of unlawful discrimination. Nor is it even necessary to decide whether or not if such a track is built or used, it becomes a part of the railroad's route in interstate commerce so that the established rate between places on such route covers the service rendered over the track constructed to the private plant in the absence of the express provisions in the established schedules. In the case at bar the railroad company did not acquire this private track. It did not even acquire the right to use it as a part of its railroad route. The track was a part of the plant of the Schwarzschild and Sulzberger Company, used by it in its private business. The Alton had no right to haul cars over this track against the will of the owner. The agreement was that for each car it was permitted to haul, the Alton should pay a refund of $1. The Schwarzschild and Sulzberger Company at any moment could have refused to permit a car to pass over its tracks. If the Alton had cars consigned to Schwarzschild and Sulzberger Company, it had no right, without the permission of that company, to haul the cars over these private tracks.

The arrangement for the refund had a direct connection with the rate for the transportation of each car. Under these facts, the Alton claimed the right to render the service over the private tracks as a part of the service under its established schedules over its railroad route and to make the refund to the shipper on the ground that it was a service which it was bound to render even though there was no statement with reference to it in the published and filed schedules. No broader question is presented for decision in this case and we respectfully submit that, as to that question, the answer must be in the negative.

The petitioners are precluded by the very language of the agreed statement of facts in this case from contending that the money refunded by the Alton was paid for the use of the tracks of the Schwarzschild and Sulzberger Company. The stipulation of facts states (Rec., p. 37) not that the money was paid to the Schwarzschild and Sulzberger Company for *the use of its tracks*, but that it was a sum paid to the Schwarzschild and Sulzberger Company at their request *for all loaded cars hauled by the railway company for the Schwarzschild and Sulzberger Company.* There was absolutely nothing in the evidence before the jury to have warranted it in finding that the money was paid for the use of these tracks, even if that would have been a defense.

Even if we were to inject into the stipulation of facts that which counsel for the petitioners erroneously assume to be there and to treat the payment as one for the use of the tracks, still the jury were war-

ranted in finding that even then the payment amounted to a rebate. It must be remembered that no exception whatever was saved to the charge to the jury. Even treating the payment as one made for the use of these private tracks, still, under the view most favorable to the petitioners, it would be a question of fact whether the tracks were a part of the Alton's railroad route, so that the service over them was covered by the established schedules, and, being a question of fact, was properly submitted to the jury.

Even if we adopt the view of the law contended for by counsel for the petitioners and admit for the purpose of the argument that the payment was a valid one if made for the use of these tracks, still, under the evidence in the case, it was clearly proper to submit to the jury for determination as a question of fact whether the payment was intended by the parties as one for the use of the tracks or whether it was intended as a direct return of a part of the established rate. The verdict of guilty amounted necessarily to a finding that the payment was not one for the use of the tracks even if we were to concede to counsel for the petitioners everything which they claim as to the law on this subject.

Counsel for petitioners discuss at length the statement in the majority opinion of the Circuit Court of Appeals to the effect that "The Alton Company could not condemn the S. & S. tracks for the sole purpose of hauling the S. & S. Co's. product from its warehouse to the Alton's public highway, because that would be a private purpose." Here again the attempt is made

to get away from the exact language used by the court and to broaden the scope of the question open for discussion. As we have pointed out, this statement by the court was not necessary in the decision of the question actually presented. But, without regard to its relevancy, is it not strictly accurate? The court is not dealing with the right to build a spur or switch to a warehouse, manufacturing establishment, or mine. It is dealing with the right to condemn a private track already constructed on the property of the shipper and constituting an integral part of the plant of the shipper, when the only reason for the condemnation is to use it to get the cars of that particular shipper out of its plant. The tracks of the Belt Line, an interstate common carrier, had been laid up to and adjoining the plant. The Schwarzschild and Sulzberger Company had constructed its plant in its own way and had arranged its tracks so that its cars were turned over to the Belt Line at the switch connecting the rails of the Belt Line with its private tracks. Can it be said that, as against the will of the owner, a railroad company may enter upon his premises and build a track for the purpose of determining at what particular place in the plant it is to receive property for transportation, when that is the sole purpose of the construction of the track in the plant? Certainly a manufacturer may construct his factory, and, without regard to the right of the railroad company to lay its tracks up to his premises, determine for himself whether or not the railroad company is to be permitted to push its track into his building when the only

purpose of the construction of the track is to determine where the railroad company shall receive his property for transportation. In no sense of the word and within the meaning of no statute can such a purpose be said to be a public one. Viewing the situation in this light and considering the facts actually before the court, we respectfully submit that the discussion of the learned counsel for petitioners on the subject of condemnation and the statutes cited by them is without application to the question which the court had in mind in its opinion and that the language there used is literally accurate.

Second. Counsel for the petitioners assert that the Circuit Court of Appeals erroneously decided "that industrial tracks and switches are not a part of the highways of commerce and *pro tanto* equivalent to an equal amount of railroad terminals." Here again there is the same ambiguity resulting from the use of the indefinite term "industrial tracks." So far as highways of commerce are concerned, the point for decision in this case is whether or not the tracks in question were a part of the interstate highway of the Alton—a part of the railroad route of the Alton, within the meaning of its published schedule. If the property had been carted to the rails of the Alton for transportation, the road over which it was hauled would, in a sense, have been a "highway of commerce."

Were these tracks a part of the Alton's railroad route, a part of its interstate highway? It seems to us that a very simple test will determine the question. A carrier is obliged to receive for transportation cars

which are tendered at its switches and other places established for that purpose. Suppose another shipper, whose property was on the premises of the Schwarzschild and Sulzberger Company, had a carload of property for transportation over the Alton and called upon that carrier to transport it in accordance with its duty, on the ground that it had been tendered to it at its tracks. Under the evidence in this case could the Alton have been required to receive and transport it? And if it had been willing to transport the car so tendered, could it, against the objection of the Schwarzschild and Sulzberger Company, have sent its engine over these tracks to get the car? It seems perfectly obvious that, within the meaning of the interstate-commerce act these tracks can in no sense be regarded as a part of the Alton's railroad route.

Third. Counsel for the petitioners assert that the Circuit Court of Appeals erroneously decided "that property does not become property in transit in interstate commerce the moment it is delivered to and is accepted by the carrier." As we have already pointed out the controlling question is not when interstate commerce in the cars which were transported commenced, but when did their transportation over the Alton's railroad route in interstate commerce, as described in its established schedules, begin. Suppose the plant of the Schwarzschild and Sulzberger Company had been outside the territorial limits of the city of Kansas City and the Alton had sent its engines over another railroad and had hauled the cars

to its tracks. The transportation would have been interstate from the moment a car started, but, within the meaning of the interstate-commerce act, its interstate transportation over the Alton's railroad route would not have commenced until it had reached the rails of the Alton and had entered upon its movement over its railroad as described in the established schedules. And of course it would not be contended that the extra service of hauling the car to the tracks of the Alton could be rendered under the schedules naming a rate from Kansas City.

Suppose that while the switch at which the cars were turned over to the Belt Line was within the limits of Kansas City, the plant of the Schwarzschild and Sulzberger Company had been just outside the city limits. Could it be contended that the service of hauling the cars from the place where they were loaded in the plant could be rendered under the published and filed schedules shown by the evidence in this case? There would be no pretense of a defense of the allowance made in this case if it were not for the fact that the plant of the Schwarzschild and Sulzberger Company is within the limits of the city of Kansas City. But do the words "Kansas City" or "Chicago" or "New York" on a railroad schedule include every point within the territorial limits of the city, or only those points which are on the railroad of the carrier which has published the schedule? If they include any point within the city off the railroad route of the carrier, they must include all points within the city, and therefore necessarily cover cartage to the place

where the property is received for transportation at the rails of the carrier.

Take this illustration. The Chicago and North Western Railroad has its tracks, owned and controlled by it, terminating on the north side of the Chicago River. Fifteen or 20 miles to the south is South Chicago, still within the city limits of Chicago. It is reached by the tracks of the Illinois Central Railroad Company. The North Western establishes its schedules, naming rates for transportation from Chicago. It is bound to receive and transport for the shipping public at those rates property tendered at its tracks in Chicago. There are no published and filed schedules making the rates which the North Western has published from points on its railroad applicable to points in Chicago on the Illinois Central, including South Chicago. A shipper sends a car over the railroad of the Illinois Central to the tracks of the North Western. The North Western takes the car, transports it to its destination, charges the rate named in its schedule, and allows to the shipper the cost of sending the car over the Illinois Central from South Chicago to its tracks. When called to account, the railroad seeks to justify its conduct on the ground that the rates in its published schedules apply to all points in Chicago, whether on its route or not. It is, of course, obvious that this is no defense, for, if it were, then the North Western, under its schedules naming rates from Chicago, could be compelled by every shipper to pay the cost of transporting the property to be shipped from any point in

Chicago to its tracks. And so the discussion of the meaning of "interstate commerce," as supplied by the safety-appliance, meat-inspection, employers' liability, and other acts, has no relevancy to this case. Property may be moving in interstate commerce and at the same time not have reached the railroad route of the particular carrier whose schedules for transportation in interstate commerce are under consideration.

Fourth. Counsel for petitioners assert that the Circuit Court of Appeals has decided that if a rate is paid in money or money's worth it can never be a rebate, while that ruling is in direct conflict with rulings and decisions of the Interstate Commerce Commission. The language of the Circuit Court of Appeals to which they refer in this case is (Rec., p. 88):

> S. & S. received back a part of the money they paid the Alton for freight. That fact alone does not prove that the transaction constituted a rebate within the definition of the statute. A railroad may pay its lawful indebtedness to a shipper out of the money the shipper pays it for freight; or a shipper may pay the full freight partially in money and partially in canceled legal demands against the railroad. The statute's definition of a rebate is any device whereby any property in interstate or foreign commerce is transported at a less rate than that published and filed. So if the full rate be paid either in money or in money's worth, the parties can not be guilty of rebating.

It is claimed that this is contrary to the ruling of the Interstate Commerce Commission, effective September 15, 1906, to the effect that nothing but money can be lawfully received or accepted in payment for transportation subject to the act. Of course, if nothing but money could have been taken in payment for the freight in accordance with the established rate, the allowance by the Alton was a rebate under any view of this case. If the service for which the allowance was made was not a service covered by the established rate, then, of course, the use of these tracks was not even "money's worth."

It is unnecessary to consider at this time whether or not the Circuit Court of Appeals has accurately interpreted the original interstate commerce act and the Elkins Act with reference to the acceptance of anything but money in payment for transportation in accordance with the published and filed rates. The rule there stated allowing the payment of freight charges, under the schedules required by the interstate commerce act, in other things than money, is probably broader than is warranted either by the language of the statute or by the decision of the Supreme Court construing a similar State statute covering transportation within a State (*Union Pacific Ry. Co.* v. *Goodridge*, 149 U. S., 680, 690). With reference to the ruling of the Interstate Commerce Commission it is sufficient to note that it was made since the passage of the Hepburn Act. By section 6 of the interstate commerce act it was provided that when a carrier has established its rates in accordance with the stat-

ute, it shall be unlawful to "collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any service in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force."

Amended section 6 of the Hepburn Act provides as follows (34 Stat., 587):

> Nor shall any carrier charge or demand or collect or receive a greater or less *or different* compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time.

The ruling of the Interstate Commerce Commission therefore is based upon a statute which in express terms, in the interest of absolute uniformity, requires the rate named in the schedule to be paid in money. Counsel have used in illustration in the discussion of this question the exchange of railroad transportation for advertising space. In the Circuit Court of the United States for the Northern District of Illinois it has been held recently that such an exchange, under contracts providing for it, was not permissible under the Hepburn Act. That case (*United States* v. *Chicago, Indianapolis & Louisville Ry. Co.*) is now pending on appeal to this court.

Fifth. Counsel for petitioners assert that the Circuit Court of Appeals erroneously decided "that a

carrier company organized under the laws of the State of Kansas may not acquire property in Kansas in accordance with the provisions of the laws of that State."

A sufficient answer to this assertion is a comparison between the statement by the Circuit Court of Appeals and the provisions of the statute of Kansas referred to by counsel for petitioners. The Circuit Court of Appeals said:

> Manifestly the Alton Company could not condemn the S. & S. tracks *for the sole purpose* of hauling the S. & S. product from its warehouse to the Alton's public highway, because that would be a private purpose.

The statute in question (sec. 6468 of the General Statutes of Kansas) provides:

> Any person, upon written permission given by the board, may exercise, in the same manner and to the same extent as is now enjoyed by railroad companies, the right of condemning and appropriating land and laying out and constructing any spur, switch or railroad track thereover, and connecting the same with any railroad already constructed; *and the right to use such spur, switch or track shall be public, at rates and on terms and conditions such as the board* (referring to the railroad commission) *shall prescribe, if the parties interested can not agree.*

Manifestly in the absence of a statute making the right to use the track open to the public, property could not be condemned, as stated by the court, for this purely private purpose.

Sixth. The sixth point presented by counsel for petitioners is as to the meaning of the word "point" or "place" as used in those portions of the interstate-commerce act referring to the establishment of schedules and the publication of rates. We have already considered this point. We call particular attention again, however, to the language of section 6 of the original interstate-commerce act, in force at the time of the transactions in question. That section requires a common carrier subject to the provisions of the act to file schedules showing the rates which the carrier has established and which are in force upon its route. It provides that those schedules "shall plainly state the places *upon its railroad* between which property and passengers will be carried." It does not seem possible that the name of a large city like Kansas City or Chicago or New York in a railroad schedule can be made to include points within the city limits not on the railroad of the carrier so as to justify the carrier in carting the property of a shipper to its tracks or to pay for hauling it over another railroad in the absence of duly published and filed tariffs making the rates specified from places on its railroad applicable to places on the railroad of the other carrier. Any such interpretation would practically destroy the efficiency of the interstate-commerce act in compelling equality and uniformity of rates so far as the large commercial centers are concerned. The shipping public, in order to require the railroad company to perform its duties as a common carrier, would have to deliver

property to be transported at the depot or tracks of the carrier. The favored shipper could have his property hauled to the tracks of the carrier and the carrier could defend its action in paying the cost of this hauling on the ground that the point from which the property was hauled was a point within the limits of the city named in the schedule.

Seventh. Counsel for petitioners assert that the Circuit Court of Appeals erroneously decided that "a shipper is not entitled to receive reasonable compensation for services or facilities rendered by him in connection with the transportation of freight." As we have already pointed out, this question is not in this case. The alleged services rendered by the Schwarzschild and Sulzberger Company were not services rendered in connection with the transportation of this property by the Alton over its railroad route. They were merely services rendered in connection with the hauling of the property to the tracks of the carrier. These private tracks were in no sense a part of the Alton's railroad route. The Alton did not have the slightest control over them. They were never held out as a part of its railroad used in serving the public. It is very questionable, however, whether prior to the passage of the Hepburn Act of June 29, 1906, a common carrier was authorized or permitted under the law to refund or repay to the shipper even reasonable charges or allowances for services which the shipper rendered in connection with such transportation or for instrumentalities which the shipper furnished for use therein. There was no provision in the law per-

mitting it, but the statute required rigid adherence to established rates.

The reference to the provisions of the Hepburn Act to the effect that "if the owner of property transported under this act, directly or indirectly, renders any service connected with such transportation or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable," tends only to confuse. And so the cases decided by the Interstate Commerce Commission since the passage of the Hepburn Act are likewise of no practical value in this case. It is to be borne in mind, however, that the Hepburn Act also provides: "Nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariffs." It seems therefore that under both the original act and under the Hepburn Act any allowance of this kind made to the shipper on account of any service alleged to have been rendered in connection with the transportation must be covered by the published and filed schedules. And obviously, the very purpose of the act requires this. For, if the carrier were permitted to make deductions from the established rate on any such indefinite basis as that of service rendered in connection with the transportation of the property, leaving it to be determined in each case whether the deduction was a reasonable

one, the door would be opened for wholesale violations of the law. In every case the burden would be thrown upon the Government to show by the very parties to the violation of the law an essential element of the offense. We submit that the court should be very slow to place upon the statute a construction so far-reaching in its tendency to destroy the efficiency of the act.

In this connection counsel for petitioners have referred to the case of *Welectka Light and Water Company* v. *Fort Smith & South Western R. R. Co.*, 12 I. C. C. Rep., 588. We respectfully submit that an analysis of that case will show that it has no bearing whatever upon the facts presented by the case at bar. In the brief filed in opposition to the application for a writ of certiorari in this case we made the following comment upon that case:

> The Fort Smith and Western Railroad Company prior to December, 1905, when the property and plant in question was owned by another company, had built a spur track connecting it with the main tracks of the railroad company under a contract which required the cost, amounting to about $400, to be repaid to the railroad company. In the month of March, 1906, the old company became insolvent and the railroad company, desiring to make use of the ties and rails of which the spur track had been constructed, took them up and removed them to another point in the town, where it built a switch to another industry. Subsequently, this property was acquired by the

Weleetka Light and Water Company, and later on, after the passage of the Hepburn law, an application was made by the Weleetka Light and Water Company to the Interstate Commerce Commission to require the railroad company to re-lay the spur track. At the time of the hearing it appeared that the railroad company offered to re-lay the spur track upon the condition that the complainant should first advance the cost, which was estimated by the defendant at $250. It was stated that after the switching connection had been made the railroad company was willing to repay the cost to the Weleetka Light and Water Company by making it a definite allowance of $2 for each car placed upon the switch track by the defendant, excluding, however, such cars as may be switched there by the defendant from the lines of competing carriers in Weleetka. The only issue which was not fully agreed to by and between the parties related to the location of the switch connection. The Commission held that if they did not decide upon that matter within thirty days the Commission would decide it for them.

It is quite evident that the proceedings and hearings in this case were had under and pursuant to the provisions contained in section 15 and section 6, heretofore quoted from the new rate law, and the case, therefore, has no special significance as a precedent for the case at bar. At the time of the payment of the rebates to the S. & S. Co. by the Chicago and Alton Railway Company, there was no provision of the interstate-commerce law regu-

> lating the matter or permitting such a contract to be entered into; nor was there any provision requiring the contract and the amount of money refunded to be published as a part of the tariffs and schedules of the carrier. Under the law as it then existed an arrangement of this character between the two companies, to wit, the shipper and the carrier, could not for reasons of public policy be sanctioned or recognized by the law. The refund of such terminal charges by the railway company to the shipper, under the circumstances detailed in the record, was necessarily illegal. The fact that the new rate law to-day might sanction and permit an arrangement or contract of this character certainly could not extract from these old cases the vice of their illegality.

It will be seen therefore that that portion of the opinion of the Commission relating to arrangements for repaying advances made by a shipper in constructing a switch track through his premises had no direct connection with the issue before the Commission for determination. It is also important to note that in referring to the language of the Commission on that subject, counsel for the petitioners have not quoted the complete statement of the Commission, which is as follows:

> In this connection it is proper to add that the Commission does not approve the practice of some carriers of repaying advancements made by a shipper for the construction of a switch track by making an allowance to him of a definite amount on each carload of

> freight shipped to or from his manufacturing plant. Such an arrangement presents too much the appearance of a *purchase of property by the carrier with transportation, which is contrary to the principles of the act.* Undertakings of this nature ought to be evidenced by a written contract, a copy of which ought to be filed with the Commission. Although the payments to be made by the carrier to the shipper under such contracts may properly be determined or based on the number of carload shipments made to or from the industry, such payments ought not to be made out of the rate as each car is moved, but ought to be made out of available funds at the end of definite intervals, say, of six months or a year. When the entire cost has thus been refunded a responsible officer of the company ought to file with the Commission a verified statement of the details of the entire transaction. It is the desire of the Commission that this course be followed in this instance in case the parties arrive at an understanding. And what is here said may be taken as a general ruling of the Commission applicable in similar cases.

The arrangement to which the Commission was referring and with reference to which it was making the general ruling was an arrangement by which the carrier purchases a side track which had been constructed by a shipper. On the repayment of the cost of construction the side track becomes the property of the carrier. No such situation is presented by the facts in the case at bar, and the language of the Commission can not by the most liberal construction be

held to have any reference whatever to the question whether the side track, while it was still owned and controlled by the shipper and before it became the property of the railroad, could be treated, within the meaning of the interstate commerce act, as a part of the railroad route of the carrier under its established schedules.

CONCLUSION.

It was a stipulated fact in the case that the money refunded was paid to the Schwarzschild and Sulzberger Company at its request for all loaded cars hauled by the railway company for the Schwarzschild and Sulzberger Company. There is nothing in the evidence to support the contention that it was paid *for the use of the tracks*. It was therefore, even under the view contended for by counsel for petitioners, proper to permit the jury to determine whether the refund was compensation for the use of the tracks or was a rebate from the established rate. But even treated as compensation for the use of the tracks it was not a lawful payment, for the reason (1) that there was no basis for it by a statement as to terminal charges in the published and filed schedules; (2) these private tracks were not a part of the Alton's railroad route, but were a part of the plant equipment of the Schwarzschild and Sulzberger Company, the service over them was not covered by the established schedules and no allowance could lawfully be made to the shipper on account of the service; (3) the allowance can not be justified as a lawful division of the through rate. In any event, it was clearly proper to submit to the

jury the question whether the tracks were a part of the Alton's railroad or were only a part of the plant equipment of the Schwarzschild and Sulzberger Company. No exceptions whatever were saved to the charge to the jury, and the only question open to review is whether it was proper, on any theory, to submit the case to the jury. If it was proper under any view of the law to submit the case to the jury, the verdict amounts to a finding against petitioners on every question of fact upon which it was proper for the jury to pass. We respectfully submit, therefore, that the judgment of the Circuit Court of Appeals for the Seventh Circuit should be affirmed.

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